

**MAKING SENSE OF JUDICIAL SENSEMAKING:  
A STUDY OF RHETORICAL DISCURSIVE INTERACTION AT THE  
SUPREME COURT OF THE UNITED STATES**

A Dissertation

by

**RYAN ALLEN MALPHURS**

Submitted to the Office of Graduate Studies of  
Texas A&M University  
in partial fulfillment of the requirements for the degree of

**DOCTOR OF PHILOSOPHY**

May 2010

Major Subject: Communication

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**ABSTRACT**

Making Sense of Judicial Sensemaking:  
A Study of Rhetorical Discursive Interaction at the Supreme Court of the United States.

(May 2010)

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This dissertation engages previous research in political science and psychology by arguing for the importance of oral arguments from a communication perspective, examining justices' rhetorical discursive interaction in oral arguments, introducing Sensemaking as a new model of judicial decision making, and discussing the legal and cultural impact of justices' rhetorical discursive interaction in *Morse v. Frederick*, *Kennedy v. Louisiana*, and *District of Columbia v. Heller*. In contrast to the aggregate behavioral models and longitudinal studies conducted by political scientists and psychologists, this study examines these specific cases in order to gauge each justice's individual interaction in oral argument and to determine how certain justices may have controlled the discursive flow of information within oral arguments, which in turn may have influenced the Court's decision making ability.

The dissertation begins with an introduction, providing an overview of the development and study of legal rhetoric from the Greeks to present day. A review of

prior literature in law, political science, and psychology displays how fields outside of communication view oral arguments and reveals where communication may provide valuable contributions to the study of Supreme Court oral arguments. Theoretical and methodological approaches adopted for the study of oral arguments are discussed. Analysis within the dissertation begins with an overview of the inherent complexity found within oral arguments and applies the previously discussed theoretical and methodological approaches to the case of *Morse v. Frederick* as a means of determining theoretical and methodological validity. Following analysis of *Morse v. Frederick*, a second case, *Kennedy v. Louisiana* is analyzed to determine if similar results will occur. Final consideration is given to a third case, *District of Columbia v. Heller*, to understand whether justices' behavior may deviate in more socially and politically sensitive cases. The dissertation concludes with suggestions for lawyers and judges based upon this study's findings and makes recommendations to scholars for further areas of research.

## **DEDICATION**

To all those who have brought me to this point, most importantly my wife who is more responsible than any other for this accomplishment, because without her love, support, and wisdom this project would never have reached fruition.

## ACKNOWLEDGEMENTS

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My research was also greatly assisted by Supreme Court advocate David Frederick, Jan Crawford Greenburg, the Georgetown Supreme Court Institute, The National Association of Attorney Generals, Oyez.org, and The Marshal's Office at the Supreme Court of the United States.

Thanks also go to my friends and colleagues and the Communication Department faculty and staff for making my time at Texas A&M University a great experience. I also want to extend my gratitude to the College of Liberal Arts and the Melbern G. Glasscock Center for their generous support.

Thanks to those who helped hone my rhetorical skills and will continue to challenge me throughout my life: Sheridan, Paul, Jeff, Robert "The Wheel" Henderson, Justin Nicolace, Kate, Colin, Kris, and Michael Gottlieb. I owe a lifetime of gratitude to my mother, father, and grandparents for instilling the value of an education and for supporting me through the long path. Finally, and most importantly, thank you to my

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## TABLE OF CONTENTS

|  | Page |
|--|------|
| ABSTRACT .....   | iii  |
| DEDICATION .....   | v    |
| ACKNOWLEDGEMENTS .....   | vi   |
| TABLE OF CONTENTS .....  | viii |
| LIST OF TABLES .....   | xi   |
| <br>CHAPTER  |      |
| I INTRODUCTION: HISTORICAL DEVELOPMENT OF LEGAL<br>RHETORIC AND SUPREME COURT ORAL ARGUMENTS ..... | 1    |
| Rhetoric and Oral Argument .....   | 4    |
| Development of Oral Argument .....   | 11   |
| Modern Oral Argument .....   | 16   |
| A Rhetorical Study of Supreme Court Oral Arguments .....   | 23   |
| II DO ORAL ARGUMENTS BEFORE THE SUPREME COURT<br>MATTER?.....                                      | 28   |
| Legal Research .....   | 32   |
| Limitations of Oral Argument .....   | 37   |
| Influence on Decision Making Process .....   | 39   |
| Political Science Research .....   | 42   |
| Psychology .....   | 53   |
| Communication .....  | 57   |
| Sensemaking.....   | 67   |
| Sensemaking Pitfalls.....  | 74   |



|     | Page  |     |
|-----|---|-----|
| III | NEW QUESTION: ORAL ARGUMENTS “MATTER,” BUT HOW?<br>PROPOSING A THEORY AND METHOD TO CAPTURE THE<br>MADNESS..... | 82  |
|     | Why Sensemaking at the Supreme Court?.....  | 83  |
|     | Theory of Judicial Sensemaking .....  | 90  |
|     | Preliminary Evidence of Sensemaking .....   | 101 |
|     | Critical Approach .....   | 105 |
|     | Paradigm Approaches .....   | 122 |
|     | Research Methods .....  | 124 |
|     | Conclusion.....   | 129 |
| IV  | ORAL ARGUMENTS MATTER BECAUSE . . . PRELIMINARY<br>REVELATIONS OF METHOD AND THEORY .....                       | 132 |
|     | The Court’s Rhetorical Discursive Interaction.....  | 133 |
|     | The Justices’ Individual Rhetorical Discursive Styles .....   | 152 |
|     | Arguing about “Bong Hits 4 Jesus” .....   | 165 |
|     | Rhetorical Discursive Interaction in <i>Morse v. Frederick</i> .....  | 170 |
|     | Quantitative Summary.....   | 178 |
|     | Qualitative Analysis .....  | 179 |
|     | Conclusion.....   | 191 |
| V   | <i>KENNEDY V. LOUISIANA</i><br>A FIRST HAND OBSERVATION.....  | 193 |
|     | Rhetorical Discursive Interaction in <i>Kennedy v. Louisiana</i> .....  | 198 |
|     | Qualitative Findings.....   | 205 |
|     | Conclusion.....   | 226 |
| VI  | HISTORICAL REPERCUSSIONS OF JUDICIAL SENSEMAKING<br><i>DISTRICT OF COLUMBIA V. DICK ANTHONY HELLER</i> .....    | 229 |
|     | Background .....  | 232 |
|     | <i>District of Columbia v. Dick Anthony Heller</i> .....  | 235 |
|     | Qualitative Analysis .....  | 245 |
|     | Conclusion.....   | 249 |
| VII | CONCLUSION<br>“SCALIA’S BIASED, WHO KNEW”.....  | 263 |

|                                     | Page |
|-------------------------------------|------|
| Broad Ranging Contributions.....    | 265  |
| Responding to Criticism .....       | 276  |
| Recommendations .....               | 282  |
| Conclusion: Pragmatic Idealism..... | 299  |
| REFERENCES.....                     | 312  |
| VITA .....                          | 326  |

## LIST OF TABLES

| TABLE                                 | Page |
|---------------------------------------|------|
| 4.1 Interruptions .....               | 171  |
| 4.2 Statements .....                  | 174  |
| 4.3 Speaking Time.....                | 175  |
| 4.4 Lawyers' Speaking Timeframes..... | 177  |
| 5.1 Interruptions .....               | 199  |
| 5.2 Statements .....                  | 200  |
| 5.3 Speaking Time.....                | 203  |
| 5.4 Lawyers' Speaking Timeframes..... | 204  |
| 6.1 Interruptions .....               | 236  |
| 6.2 Statements .....                  | 238  |
| 6.3 Speaking Time.....                | 241  |
| 6.4 Lawyers' Speaking Timeframes..... | 244  |

## CHAPTER I

### INTRODUCTION: HISTORICAL DEVELOPMENT OF LEGAL RHETORIC AND SUPREME COURT ORAL ARGUMENTS

I think it is extraordinary these days the tremendous disconnect between the legal academy and the legal profession. ... They occupy two different universes. What the academy is doing is of no particular use to people who practice law.

–Chief Justice John Roberts<sup>1</sup>

Dear Chief Justice,

It may appear unusual that an entire work be directed towards a single individual, but my scholarship in this text will have the greatest impact upon the Court if you take seriously some of the findings in this study and seek to correct the imbalance in communicative interactions between justices and lawyers at oral argument. At the very least, a shift in the current style will better reflect upon audiences the serious consideration and measured justice with which the Court scrutinizes each case. While lawyers, judges, and legal scholars will find unique insights and beneficial suggestions within this study, as Chief Justice, you have the ability to influence directly the communicative interactions between lawyers and justices. I have witnessed you prevent justices from asking questions in order to allow a lawyer to finish their response, and I have also observed you end an oral argument as another justice was leaning forward to ask a question. Your substantial power within the rhetorical environment of oral

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This dissertation follows the style of the *Quarterly Journal of Speech*.

<sup>1</sup> John Roberts, “Supreme Court Interview” [www.Lawprose.org](http://www.Lawprose.org)

argument can greatly affect the manner in which other justices understand and evaluate a case.

Frequently in oral argument, justices who dominate the interaction may prevent less active justices from posing important questions to advocates, and more importantly, having their questions answered. Your position should ensure the opportunity for each justice to have their questions properly responded to by advocates. We should expect oral argument to be a site where all the justices may have important lingering questions resolved by advocates. At the very minimum, oral arguments should reflect a balanced and fair treatment for advocates on each side, particularly because the public observers, upon which the Court's authority rests, should respect the equal attention and care you give to every case and each counsel. Some cases draw greater attention in oral argument from the justices than other cases, but those cases which attract significant social and political attention tend to foster vigorous and sometimes unbalanced interactions. Of course the irony is that these significant social and political cases require the most careful and balanced scrutiny both because of the public's interest in the case, as well as the larger reaching social implications of the Court's ruling. The people have a right to expect balanced consideration of both sides of a case, particularly when the Court's decision will have wide spread influence upon the American people. In the past, I realize oral argument has been characterized as a dialogue among the justices, but this singular purpose overlooks the many purposes each justice, lawyer, and audience member brings to the case. Within dialogues each actor may have multiple purposes within the engagement, and one can imagine that with nine justices and two advocates,

at the very least a multiplicity of purposes exist. This study will foreground a number of an actor's purposes that can be found in oral argument. As an important component of the justices' decision making process, of a lawyer's representation of a case, and of the public's regard for the Court, oral argument requires that you pay a strict level of attention to the communicative interaction between justices and advocates.

Your charge at the opening of this work suggests the impractical nature of the academy's research. Admittedly not all legal scholars design their research to contribute pragmatically to the practice of law, but many do, and yet academics also suffer from the disparagement of public officials, who ignore their rich and pragmatic scholarship, and thus the reverse of your critique holds true. We must not ignore each other. I have attempted to capture and lay forth the complex dynamics found within oral argument in a manner that reveals the serious and influential nature oral arguments play in the judicial decision making process. I hope you find my scholarship both interesting and useful in your approach to oral arguments. And to those lawyers, judges, law students, or legal scholars, reading at this time, I also hope that you discover information that proves useful, because I have designed this study to act as both a contribution to knowledge in the field of legal scholarship, as well as to provide pragmatic suggestions based upon my findings. Of course the influential nature of my research depends upon my persuasiveness, so without continuing further, I will let the text speak for itself. "Mr. Chief Justice and may it please the Court ...".

## Rhetoric and Oral Argument

Rhetoric and Oral Argument before the Supreme Court are topics well suited for one another, but few scholars have written academic articles about oral argument from a rhetorical perspective. In fact only two journals in the field of Communication even address the issue of oral argument before the Court, and those two articles were written by political scientists describing the various functions oral argument serves for justices.<sup>2</sup> Other scholars in Political Science, Psychology, and Law have written extensively on the topic of oral argument, but scholars in Communication, and rhetorical studies in particular, have largely ignored the topic. The lack of research from Communication scholars may be due to the prior inaccessibility of the Court's proceedings. Unlike televised presidential speeches or Congressional debates, the communicative interaction within the Court's oral arguments could only be experienced in person, requiring scholars to travel to the Court during its limited schedule. Transcripts have been available for quite some time, but lack any attention to the tone and emotion of statements, which can make it difficult for readers to discern sarcasm from good natured joking. Only recently, has an organization called Oyez.org posted audio files online where researchers can listen to the debates. Audio files of oral arguments provide a better insight into the communicative process, but scholars still lack the non-verbal behavior between the justices and the advocates. Accessibility proves a key difficulty in examining oral arguments from a rhetorical perspective, but technology is slowly

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<sup>2</sup> See Stephen Wasby, Anthony D'Amato, and Rosemary Metrailler, "The Functions of Oral Argument in the U.S. Supreme Court" *The Quarterly Journal of Speech* 62 (1976): 410-422.; Milton Dickens and Ruth E. Schwartz, "Oral Argument before the Supreme Court: *Marshall v. Davis*," *The Quarterly Journal of Speech* 57.1 (1971): 32- 42.

removing prior barriers and it will only be a matter of time before cameras are allowed into the Courtroom to capture major case proceedings.

This dissertation has taken advantage of technological innovations, and first hand observation to provide a new perspective through a rhetorical study of oral arguments based upon assumptions in the field of Communication. My dissertation seeks to engage previous research in Political Science and Psychology by arguing for the importance of oral arguments from a communication perspective, examining justices' rhetorical discursive interaction in oral arguments, introducing Sensemaking as a new model of judicial decision making, and discussing the legal and cultural impact of justices' rhetorical discursive interaction in *Morse v. Frederick*, *Kennedy v. Louisiana*, and *Heller v. District of Columbia*. In contrast to the aggregate behavioral models and longitudinal studies conducted by political scientists and psychologists, my dissertation will examine these specific cases, in order to gauge each justice's individual interaction in oral argument, and to determine how certain justices may have controlled the discursive flow of information within the oral arguments.

Although the popular understanding of "rhetoric" used by media and political pundits refers to deceitful or insincere communication, this cultural position ignores the noble conception of rhetoric lauded and theorized by Aristotle, Cicero, St. Augustine, Sir Francis Bacon, and other prominent thinkers. Scholars have long considered rhetoric an essential tool for communicating and arguing a position, and a particularly useful art for law. At its essence the study of rhetoric focuses on persuasion; Aristotle called the study of rhetoric "an ability, in each particular case, to see the available means of



persuasion.”<sup>3</sup> For Aristotle rhetoric was both a method, or technique with no particular subject, as well as a practical art.<sup>4</sup> He divided his study of rhetoric into three classes which he called epideictic, forensic, and deliberative. Epideictic rhetoric emphasized praise or blame concerning a subject, while deliberative rhetoric examined whether political actions should or should not be adopted. Forensic or legal rhetoric evaluated the truth and falsity of past events and highlights the role of persuasion in the courtroom. Aristotle’s categories present one of the earliest considerations of legal rhetoric and he provides a specific concern for legal rhetoric that distinguishes it from other rhetorical forms.

While historically rhetoric and law have been intimately connected, the Supreme Court’s modern day oral argument has been the result of developments in the legal field spanning thousands of years. In contemporary terms, “legal rhetoric” broadly encompasses judicial opinions, jury judgments, the speech of lawyers and judges, historical discussions of law, legal theories, federal and state laws, as well as other areas of legal scholarship. To focus on the development of legal rhetoric in its movement towards oral argument before the Supreme Court, the following historical overview emphasizes a Western legal tradition, due to the Court’s ties to English Common Law, and foregrounds the evolution of laws, and the language of lawyers and judges, because rhetoric is both method and practical in the laws judges and lawyers generate.

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<sup>3</sup>Aristotle. *On Rhetoric: A Theory of Civic Discourse*. Trans. George Kennedy (Oxford: Oxford UP, 1991) 37.

<sup>4</sup> For more on Aristotle’s general view of rhetoric see George Kennedy’s introduction in *On Rhetoric*.

## Historical Contributors

As an institution the Supreme Court has resulted from thousands of years of legal tradition. In the Supreme Court's courtroom, figures of Hammurabi, Moses, Justinian, Muhammad, and other historical characters are depicted in friezes to recognize their historical contribution to law which has contributed to the creation of the Supreme Court. The Court's Greco-Roman architecture reflects its debt to Greek and Roman culture, the birthplace of two legal traditions that dominate American, British, and European conceptions of law. Tracing the development of laws and legal rhetoric provides a historical understanding of the central role legal rhetoric played across Western cultures and at the Supreme Court.

Greek and Roman traditions figure most prominently into the Court's architecture, but ideologically the cultures established a tradition that serves as the foundation of the American legal system. Greeks understood law as a process conferring general benefits to the people which served as a mediating force between humans of equal status.<sup>5</sup> Two forms of justice existed with Greek society. Deliberative justice was established by legislators, while corrective justice was handed down by juries and judges, similar to our own justice system. Either form of justice rested on a social contract between the state and individual, morally obligating citizens to follow the state's laws and take an active role in participating in Greek civic life. J.M. Kelly suggests that the Greek's concept of social contract "foreshadowed the most pervasive and most fruitful of European political and legal theories" through Locke's own expansion upon "the idea that submission to government and law, the fundamental civic

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<sup>5</sup> Greeks extended legal rights to males and restricted the legal rights of women, foreigners, and slaves.

duty, rests on supposed agreement to which the individual citizen remains by implication a party.”<sup>6</sup> In order to successfully traverse the relationship between individual and government in Greek life, citizens studied rhetoric for the public speaking roles they were expected to engage in. Knowledge of legal rhetorical principles was crucial because Greek citizens were expected to represent and argue their positions before juries and judges occupying the government’s role as governor and mediator.

The active role legal rhetoric played in Greek life elevated the importance of its development. The Greeks first established and articulated ideas of what we now know as “due process of law.” Under due process every person, even rulers, fell subject to the rule of law, and these laws articulated specific procedures that were guaranteed to citizens as a way of obtaining justice for society. The egalitarian approach to the development of justice and laws drew the Greek’s attention to the equity and flexibility of laws, or what has become known as the division between the letter and the spirit of the law. Interpreting laws within social contexts raised questions about the role of punishment. Punishment required a consideration of the transgressor’s intent and whether punishment should be corrective or a form of deterrence. But in order to understand what form of punishment should be prescribed, Greeks believed that both sides of a case should be heard. Within Greek society, legal rhetoric informed many of our contemporary understandings of our own justice system, such as our right to due

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<sup>6</sup> J.M. Kelly, *A Short History of Western Legal Theory: sustainable diversity in the law*. (Oxford: Clarendon press, 1992) 14.

process, debates about the letter or spirit of the law, the purpose and application of punishment, as well as the tradition of hearing both sides of a case.<sup>7</sup>

Aristotle believed that knowledge of legal rhetoric was essential to Greek life. His work *On Rhetoric* provides a variety of legal arguments speakers may employ in a variety of situations and he understood legal rhetoric to be concerned primarily with a person's guilt or innocence in a previous event. For Aristotle, law formed and shaped states' virtues that in turn cultivated individuals' morals. Legal rhetoric was employed to mediate the relationship between individuals and the relationship between individuals and the state. Individual's actions, Aristotle theorized, could be classified as just or unjust based the law and those affected. He divided laws into those that were "universal" or natural laws and laws that were "particular" or state based. Universal laws articulated behavior that all humans should follow and were pervasive across civilizations. Particular laws varied between states and were unique to that culture or society. Aristotle also identified that both a community and individual could harm through injustice, and the severity of an action, and thus the punishment, could vary depending on the circumstances of harm. His teachings provide the first systematic exploration of legal rhetoric, painting a noble and practical picture of an art form he felt was essential to Greek life.

Building on Aristotle's conceptions and Greek laws, the Romans contributed a great deal to the development of laws and legal rhetoric, largely by establishing the lawyer as a legal profession. While Greek laws derived from philosophical

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<sup>7</sup>For an expanded discussion see Kelly *A Short History of Western Legal Theory*.

considerations of the role of law and justice, Romans approached the law with more pragmatic considerations, exempting rulers from following laws, using legislators to establish laws, and relying on praetors or judges to determine how laws should be applied. According to H. Patrick Glenn's *Legal Traditions of the World*, Romans' concern with practical matters contributed to our own development of contract law in areas such as private ownership, trusts, mortgages, bailment, leases, partnerships, and liability. Because Roman law provided "governance of complex personal relationships," it became "an object of admiration."<sup>8</sup> Romans systematic approach to laws resulted in the compilation of Roman laws called the "12 Statues" which codified already existing traditions within Roman culture. The 12 statues provided all citizens with a basis of appropriate conduct and served as the first example of codified law which would later inform the Napoleonic Code and provide the foundation for Europe's Civil Law legal system. In addition to these substantial contributions, the emperor Justinian compiled a list of judicial opinions to give guidance to judges for how laws should be properly interpreted and applied.

Roman scholars Cicero and Quintilian largely expanded on Aristotle's conceptions of legal rhetoric, but contributed in their own unique ways. Cicero expanded legal rhetoric's audience by writing down his legal theory for distribution, facilitating the sharing of ideas and exposing new audiences to legal theory. Quintilian emphasized the ideal nature of law and its transformative ability by which the just man could restore justice and prominence to his country. Quintilian's optimistic view of

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<sup>8</sup> H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford UP, 2004) 120.

legal rhetoric likely arose from the chaotic environment in Rome that resulted from the rise and fall of six emperors. The chaotic environment of the Roman empire caused even greater chaos in Roman territories where conquered peoples were suddenly left without the guiding principles of the Roman empire and forced to establish their own laws.<sup>9</sup>

In England, the Norman invasion spawned what is now recognized as the Common law system because ruling nobles were forced to develop a judicial system to maintain order in local populations. Nobles appointed judges to be responsible for maintaining order, and jurisdiction, while juries composed of townspeople determined the judgment and sentence of fellow transgressors. Local lawyers began relying on juries' previous decisions to establish precedent as a persuasive means of ruling in a case. Successful lawyers would often draw on juries' rulings from other towns to persuade juries to follow a similar ruling. Our own court system draws heavily from the patterns established by Norman nobles.<sup>10</sup>

### **Development of Oral Argument**

The Supreme Court bears clear connections to Greek, Roman, and English legal traditions by relying on a common law tradition that seeks to interpret legal codes established by legislatures and states. Legal rhetoric has been at the heart of the Court's historical and intellectual development but comparatively few scholars pay attention to

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<sup>9</sup> For more on Cicero and Quintilian see Patricia Blizell and Bruce Herzberg, Eds. *The Rhetorical Tradition* (New York: Bedford St. Martin, 2000).

<sup>10</sup> For an extended discussion see Kelly's *A Short History of Western Legal Theory* and Glenn's *Legal Traditions of the World*.

the contemporary role legal rhetoric plays in the Court's primary ritual of oral argument. The rhetorical art of oral argument before the Supreme Court of the United States has shifted dramatically from the artful and poignant days of Daniel Webster's arguments to the contemporary intellectual whirlwind designated by a flurry of thrusts and parries. Over the past two hundred years, the Supreme Court's conduct of oral argument has significantly transitioned from the Court's early days in which multiple lawyers could argue cases for days, to the current model in which lawyers on each side typically receive only thirty minutes for their case.<sup>11</sup>

David Frederick's *Supreme Court and Appellate Advocacy* traces the evolution and importance of oral argument throughout the Court's history. In 1791 significant "uncertainty among practitioners" resulted from the Court's early position, which caused the Court to issue a statement noting "that this court considers the practice of the court's of King's bench, and of chancery in England, as affording outlines for practice of this court; and that they will from time to time, make such alterations therein as circumstances may render necessary."<sup>12</sup> Originally following the English common law tradition of oral argument at the King's Bench, the Supreme Court historically relied on lawyers to provide them with the information and facts of a case within oral argument. The material oral presentations to a judge were designed to "diminish the possibility of

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<sup>11</sup>Oral argument for *Gibbons v. Ogden* lasted 20 hours and spanned five days, while *McCullough v. Maryland* had six arguing advocates.

<sup>12</sup>David Frederick, *Supreme Court and Appellate Advocacy: Mastering Oral Argument* (New York: West, 2002) 15.; Supreme Court rule VII, issued 8/1791.

out-of-court influence.”<sup>13</sup> Similar to the King’s Bench, oral argument heavily influenced the Court because it was largely the only opportunity through which justices learned about a case’s details which would in turn impact a justice’s vote. A lawyer’s oral argument often served as the only information justices used to decide cases. Today this seems highly unusual given the Court’s requests for written briefs, but the reliance upon written briefs was a slow process and began a slow diminishment in the central role oral argument once played.

In the late 1700s and early 1800s, justices did not impose time limits because they believed lawyers should have the necessary time to serve their client’s needs. Wide discretion caused oral arguments to often drift away from the topic at hand. One can imagine the difficult task lawyers were charged with in maintaining the justices’ attention while expounding the necessary details of a case over the course of a few days. Likewise, justices must have struggled to remain attentive during days or even weeks of a lawyer’s argument. The transmission and consideration of a case’s details through the process of oral argument were less than ideal. Because of humans’ poor attention span, tendency to mentally wander, and lawyers’ meandering arguments, written briefs proved easier to follow than a lawyer’s oral arguments. In 1833 the Court allowed written briefs to accompany a lawyer’s oral arguments noting “the court will receive printed arguments, if the Counsel on either or both sides shall choose.”<sup>14</sup> The allowance of written briefs began the movement towards significantly diminishing the presence and

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<sup>13</sup> Frederick, *Supreme Court*, 16.

<sup>14</sup> Supreme Court rule XL issued 1/1833.



importance of oral argument within Supreme Court cases, shifting away from “the long pedantic orations that had marked Supreme Court practice up to that time.”<sup>15</sup>

As the nation grew, so too did the Court’s workload. Justices were forced to develop procedures through which they could process the ever growing case load. Justices began relying on written briefs by which they could more conveniently and efficiently weigh the arguments at hand. Written briefs also helped to supplement oral arguments by reminding justices of a lawyer’s arguments and highlighting important details. In the early 1800s, oral arguments still played a central role in the Court’s consideration of a case. However, in 1849 the Court limited oral arguments to two hours and required lawyers to submit written briefs beforehand.<sup>16</sup> Written briefs expedited justices’ introduction to a case’s arguments and allowed oral argument to be employed more efficiently to clear up any ambiguities in the case and answer any questions justices might have. The primary introduction of arguments and facts came about through a case’s brief, and oral argument, while necessary, assumed a secondary supporting role. Finally, in 1970 the Supreme Court established the current rule in which each counsel is accorded 30 minutes.<sup>17</sup> The change in oral argument time developed from the Court’s experience with their summary calendar, which limited cases placed on the summary calendar to one hour. The justices found that the issues in most cases could be

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<sup>15</sup> Frederick, *Supreme Court*, 23.

<sup>16</sup> Supreme Court rule 53 (issued 1/1849) and rule 58 (12/1850).

<sup>17</sup> Supreme Court rule 28 (issued 5/1999).

adequately addressed within a one hour time span.<sup>18</sup> As a consequence of restricting oral arguments, the art of oral argument before the Supreme Court transitioned from lawyers presenting the facts and argument's of a case to lawyers "clarify[ing] and emphasize[ing] what has been written," thereby "boiling a case down to its essence."<sup>19</sup> Today's lawyers now approach oral argumentation as an opportunity to highlight the crucial elements from which the case should be decided.

The changes in oral argument resulted from a tradition shifting away from orality to written arguments, and a shift in power from lawyers to judges in their control of information in their arguments. The evolution has primarily occurred because of the Court's overwhelming workload. In recent years the Court has had over 9,000 cases on the docket submitted for review and only hears arguments in about 70 cases a year. Simply as a means of bureaucratic efficiency the Court must rely on lawyers' written arguments through petitions, and *writ certioraris*, before ever granting oral argument. The oral argument itself has shifted from the presentation of information to a clarification and rigorous test of the lawyer's position by the justices. Instead of oral argumentation serving the lawyer's purpose, justices often use the time to raise their own questions and challenges concerning the case.

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<sup>18</sup> See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth Geller, *Supreme Court Practice: For Practice in the Supreme Court of the United States* (Washington Bureau of National Affairs 2002) 672.

<sup>19</sup> Ruggero Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (South Bend: Notre Dame Law School, 2003) 31.; David C. Frederick, *Supreme Court*, 9.

## Modern Oral Argument

The American art of oral argumentation has changed dramatically from its inception in the 1790s.<sup>20</sup> But now, perhaps more than ever, it is crucial to have a lawyer successfully navigate the intellectual gauntlet justices throw before them; because in 30 minutes, litigants must address questions from all nine justices, with incessant interruptions, and still attempt to foreground the crucial issue on which justices should make their decision. The intellectual environment of oral argument makes it one of the most difficult rhetorical skills anyone could perform. David Frederick, who at this writing has argued more than 30 cases before the Court, noted that

contextual dynamics put a high premium on the advocate's nimbleness and mental agility in maintaining focus on the main points to present and in fending off hostile questions that threaten to undermine the case ... argument often seems as though it is a series of sound bytes, strung together amid frequent interruptions from the bench. The intensity level of a typical Supreme Court or court of appeals is great.<sup>21</sup>

Despite the intellectual intensity in oral argument, advocates relish the opportunity to argue before the Court. Frederick suggests that the “reward” of oral argument lies in “the thrill of being alone in the well of a court composed of some of the smartest humans on Earth, the satisfaction of passing an exacting and demanding test of personal skill and fortitude, and the honor of playing at least a small part in the development of the law.”<sup>22</sup>

Justice Ginsburg has also remarked about her first oral argument in which

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<sup>20</sup> For a more comprehensive discussion see David Frederick, *Supreme Court*, 14-49; David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 7<sup>th</sup> ed. (New York: Norton, 2005); Robert Stern, et al., *Supreme Court Practice*.

<sup>21</sup> Frederick, *Supreme Court*, 49.

<sup>22</sup> Frederick, *Supreme Court*, 13.

I looked up at the bench and experienced a feeling of extraordinary power. There sat nine top judges in the land. They had no place to go. They were my captive audience for the next several minutes. Then a teacher by trade, I relished the opportunity to persuade them that my cause was just, my legal argument sound.<sup>23</sup>

Both Frederick and Ginsburg's comments resonate with the experiences of other novice advocates and reflect the comments of other lawyers who have argued before the Court. When leaving the Courtroom it was common for arguing advocates to be asked by family and friends about their feelings regarding the experience. All advocates mentioned both the honor as well as the intellectual rush they felt when presenting before the justices. One attorney likened the experience to delivering a sermon in church and remarked that he would love to argue again before the Court. Arguing before the Supreme Court is a coveted honor within the legal community and has become a coveted opportunity for advocates. Reappearing advocates often work cases pro bono and when cases are first granted certiorari by the Court, phone calls from various lawyers offering pro bono services bombard petitioners and respondents.

Since so much honor and excitement are involved with an advocate arguing before the Court, it is ironic that so few advocates argue skillfully. It also seems ironic that law schools spend little time on developing their student's rhetorical skills, particularly when lawyers arguing cases before the Supreme Court or other appellate courts face significant oratorical challenges which require extensive skills in delivery and argumentation to persuade justices. Noting the irony of this situation, Raymond Walkins suggests that while "appellate argument is a common occurrence and represents

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<sup>23</sup> Ruth Bader Ginsburg, Intro. *Supreme Court and Appellate Advocacy: Mastering Oral Argument* by David Frederick (New York: West, 2002) vii.

the culminating competitive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole.”<sup>24</sup> The lack of preparation has resulted in justices remarking that “four out of every five arguments” they listen to are “not good” or “far below what it could be,” furthermore justices have been “astonished” by the “number of disappointing arguments to which courts listen.”<sup>25</sup> Justice Douglas has also remarked on the poor quality of advocates who appear before the Court noting “few truly good advocates have appeared before the Court. In my time, 40 percent were incompetent. Only a few were excellent.”<sup>26</sup>

Personal observations of nearly forty Supreme Court oral arguments also revealed advocates’ poor skills in delivery and argumentation. At the height of argumentation and delivery, when one would expect lawyers to perform at the greatest level of articulation and persuasion, most lawyers struggled to foreground crucial and essential elements of their cases. My observations resonate with those of previous scholars. In Anthony Lewis’ *The Supreme Court and How It Works*, he notes that “considering how important oral arguments can be, it is sad to say that most of them are badly done. Lawyers appearing before the Supreme Court are frequently nervous,

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<sup>24</sup> Raymond S. Wilkins, “The Argument of an Appeal,” *Advocacy and the King’s English*. Ed. George Rossman (Bobbs-Merrill 1960): 277.

<sup>25</sup> Frederick Bernays Wiener, “Oral Advocacy,” *Harvard Law Review* 62 (1948) 56.; Warren E. Burger, quoted in Timothy Robinson “Attorneys’ Standards Eyed Here” *The Washington Post*. June 4<sup>th</sup>, 1975.; John M Harlan. “What Part Does Oral Argument Play in the Conduct of an Appeal?,” *Cornell Law Quarterly* (1955)11.

<sup>26</sup> Myron H. Bright, “The Ten Commandments of Oral Argument,” *American Bar Association Journal*. 67 (1981) 1136.

unprepared, or worst of all, overconfident.”<sup>27</sup> Former Supreme Court law clerk, Edward Lazarus, echoes a similar sentiment describing “much of the advocacy before Court” as “mediocre and some downright contemptible.”<sup>28</sup> In the cases I observed, many lawyers stumbled and stammered their way through various questions posed to them by justices, often losing a valuable opportunity of persuasion by failing to clearly address, respond to, or shift a justice’s challenging question to more advantageous territory. Other lawyers could not respond and did not seem prepared for justices’ hypotheticals. Most surprisingly, a large number of advocates at the opening of their argument failed to provide a concise statement highlighting the crucial elements of their brief. Often called a “mapping statement,” a brief opening statement that foregrounds the primary points you plan to address prepares audiences and enables them to recall arguments. The top advocates I observed all used mapping statements and articulated their points within two minutes. Other advocates attempted similar feats, but failed to move succinctly through their points, tangling themselves in smaller arguments, or attempting to explicate too many points. Justices will grant arguing counsel in between a minute and two minutes to layout their argument before they begin to interrupt with questions. After the justices begin their questioning, it is very difficult to finish articulating essential points to one’s case. While top advocates incorporated simple techniques in the case I observed, their overall delivery and rhetorical styles caused them to stand apart from other lawyers. The top advocates’ skills resulted in a performance in which “nothing [could] equal the

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<sup>27</sup> Anthony Lewis, *The Supreme Court and How It Works*. (Library binding, 1966) 125-126.

<sup>28</sup> Edward Lazarus, *Closed Chambers*. P.34, 1999.

experience of seeing the great advocates at work in the courts and catching the magic of the spoken word, for it [was] not so much what [was] said but the manner in which it [was] said that matters.”<sup>29</sup>

While it is certain that Supreme Court oral argumentation is an incredibly difficult skill and requires an intelligent skillful speaker, justices do not expect lawyers to emulate Cicero, but rather expect lawyers’ argument to include basic public speaking principles. Justice Scalia and Bryan A. Garner’s new work *Making Your Case* reads like an undergraduate public speaking textbook and includes such profound topics as “know your audience,” “never read an argument,” “never memorize an argument,” and “don’t chew your fingernails.” While I needle the great needler, Scalia and Garner’s work results from the lack of skilled advocates who appear before the Court. A Supreme Court justice’s book articulating basic public speaking principles is evidence enough that many of the advocates appearing before the Court are not prepared to handle the intellectual rigors of oral argument.

In order to raise the rhetorical skills of advocates before the Court, law schools at Georgetown and Stanford have both created Supreme Court Institutes which assist lawyers in preparing and practicing their oral arguments. Georgetown’s Supreme Court Institute has elevated the quality of advocates’ arguing before the Court, but rarely provides feedback regarding an advocate’s delivery, focusing instead on the articulation of clear legal principles. Georgetown has done an impressive job of replicating the interior Courtroom and famous advocates such as David Frederick, Tom Goldstein, and

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<sup>29</sup> Lord Birkett, *Six Great Advocates* (New York: Penguin, 1961) 107.

Miguel Estrada assume the coveted roles of Supreme Court justices, intellectually grappling with the arguing attorney. The exchange and development of arguments between advocates and “justices” enables counsels to reduce their case to its essence and articulate the fundamental concepts upon which their case depends. Guidance in rhetorical delivery can grow problematic because, as one attorney explained, critiquing an advocate’s manner of speaking cannot be remedied within a week before oral arguments, often when Georgetown’s SCI hears a counsel’s argument. The lawyer further explained that advocates may also take such criticism personally and it may do more to hinder the group’s suggestions rather than assisting it. While the attorney’s insights seemed reasonable, a handful of simple suggestions could have assisted the advocate in fending off the justices attacks.<sup>30</sup> Most attorneys’ lack of experience with the Court, and the success of repeat counsels before the Court has led to a niche forming of highly experienced lawyers in Washington D.C. In observing oral arguments, there is a substantial difference between experienced and inexperienced counsels. Experienced counsels often are more confident and take more liberties with the justices than novices, most likely due to their substantial experience before the Court.<sup>31</sup> Counsels’ with significant experience before the Court also have their own rhetorical flourishes that help them manage the justices’ questions and often concisely respond to a justice’s question

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<sup>30</sup> To be fair, most advocates use moot courts as warm up sessions to prepare for oral argument, and there was a substantial change in the advocate’s delivery who prepped at Georgetown. However, the change in his argument could easily have been the result of his experience in ten previous arguments before the Court.

<sup>31</sup> Differences will be discussed at length in chapter 2.



without wasting valuable time. The justices also treat more experienced counsels with less formality, and tend to probe more deeply and stringently into the issues before the Court, establishing a high expectation for performance in an experienced advocate. Less experienced advocates, often first time performers or young lawyers will receive a gentler reception from the Court; however, if a young attorney or novice advocate is unable to articulate the essence of their case or answer the justices' questions, he or she may endure what will seem like an eternity of questioning before retreating to their seat. Georgetown's Supreme Court Institute has provided novice advocates with a valuable opportunity to practice their delivery and arguments before a handful of "justices," and saved a countless number from a scarring argument.

Georgetown and Stanford's Supreme Court Institutes, and books by Scalia and Garner, and David Frederick reflect a renewed interest in rhetorical skills within the Court's oral arguments and is a call for Law to recognize the practical nature of rhetoric and the benefits of its study. As a field, Communication, is intimately concerned with the role of language in humans' daily lives, and makes it a particularly well suited discipline to consider the role of oral arguments before the Supreme Court. Rhetoricians, group communication scholars, and discourse analysts would all find the Court's oral argument to be a fascinating site of study; however, rhetoricians concern with persuasion through the structure and advancement of arguments make them particularly well equipped to approach the study of oral arguments. Previous scholars studying oral argument draw from scientific disciplines that offer studies which ignore the role of language and argument in oral arguments, focusing instead on the

psychological or decision making of justices across longitudinal studies. Political scientists and psychologists have long believed that oral arguments make little difference to the outcome of cases before Supreme Court justices, commonly noting that there is no direct causal relationship between oral arguments and the justices' voting patterns.

However, this scientific approach to studying oral arguments ignores the complexities and nuances with which language can influence judicial thinking and in turn constitute reality through the justices' opinions. Although language's constitutive nature and subtly powerful influence is a common theoretical position within the field of Communication, political scientists often overlook language's potential. While a substantial amount of humanistic research has been conducted on the Supreme Court, primarily through the rhetorical criticism of justices' opinions and the relationship between rhetoric and hermeneutics, very few studies examine the rhetorical role of oral argument before the Supreme Court.

### **A Rhetorical Study of Supreme Court Oral Arguments**

My dissertation seeks to engage previous research in Political science and Psychology by arguing for the importance of oral arguments from a Communication perspective. Political scientists and psychologists often ignore the complex environment of oral arguments, such as verbal cues, and body language, preferring instead to focus solely on written transcripts. My method of analyzing the Court's oral arguments blends ethnography, rhetorical criticism, and discourse analysis to reveal language's dynamic influence on oral arguments. In contrast to the strategic actor and other decision making models adopted by political scientists and psychologists to explain the justices' behavior,

I suggest that scholars consider Sensemaking as an alternative model, primarily because it emphasizes the role of discourse in human decision making. In establishing the case for Sensemaking, I hope to foreground the importance of rhetorical discursive interaction with the Court's oral arguments, drawing attention to the importance of understanding how the Court's communicative interaction may influence their decision making abilities.

Where prior studies of oral arguments have adopted aggregate behavioral models and longitudinal research conducted by political scientists and psychologists, I examine three specific cases, and immerse myself in the Court's oral argument. Thus instead of providing another objective post-positivist study, I seek to establish a more interpretive and textual based understanding of the rhetorical discursive interaction found within the Court's oral arguments. Before examining the three cases chapter II and III provide a background to the literature and theory of Sensemaking. Chapter II addresses a driving concern of lawyers, political scientists, and psychologists by attempting to answer the question: "Do oral arguments matter?" A survey of literature from the fields of Law, Political Science, and Psychology provides tentative answers, but exposes the limitations surrounding prior approaches to the study of oral arguments. An answer to this question from the field of Communication explains the importance of communication within human engagement. Chapter II concludes by introducing readers to Sensemaking as a model of communication and as a form of decision making. Chapter III responds to the more difficult question of "how do oral arguments matter?" by reinterpreting everyday human sensemaking into a form of judicial decision making, and proposing key

behaviors observers could witness in sensemaking justices. In explaining judicial sensemaking behavior, I argue why sensemaking could be an undesirable form of judicial decision making that should be carefully avoided. The dissertation's primary research questions are laid forth:

1. Do justices demonstrate a substantial preference for one counsel over another in
  - a. their challenging of counsels,
  - b. permitting counsels an equal opportunity to respond,
  - c. the frequency at which they interrupt counsels,
  - d. their assistance of counsels arguments, and
  - e. their treatment of counsels?

To answer these questions chapter III situates Sensemaking between two prominent areas of communication: Rhetoric and Discourse Analysis to explain the adoption of a variety of methodological approaches that can address the driving research questions. Chapter IV applies the methodology discussed in chapter III to *Morse v. Frederick* known infamously as the “Bong Hits 4 Jesus” case; however, before analyzing the case, I provide readers with a description of the Court's general style of interaction, the various purposes of oral argument, and the justices' individual styles to give readers a general understanding of the Court's interaction. I chose to analyze *Morse v. Frederick* because the justices and advocates' interaction in oral argument gives readers a clear picture of sensemaking behavior and the potential dangers associated with it. In evaluating *Morse v. Frederick*, I compare the strategic actor model (the dominant model

of decision making within political science Supreme Court research) to the sensemaking model of decision making to determine whether justices act as sensemakers or strategic actors within the case's oral arguments. The chapter establishes sensemaking as a viable model that can be used to understand rhetorical discursive interaction in oral arguments. Chapter V applies a more rigorous methodological standard by requiring that I evaluate an oral argument in person, because I was not present for the *Morse v. Frederick* oral argument. Chapter V considers *Kennedy v. Louisiana* which challenged the constitutionality of the death penalty being applied to a conviction of child rape in which the child did not die as a result of the crime. Chapter V uncovers similar sensemaking behavior by the justices, but not to the degree to which it occurred in *Morse v. Frederick*. Chapter VI questions whether justices may act more carefully in historically important cases and focuses on *Heller v. District of Columbia* the first 2nd amendment case the Court has heard in over 70 years. It seems reasonable to believe the justices will more carefully evaluate cases that hold an extraordinary level of social significance. *Heller v. District of Columbia*, not only offers a recent historical case, but also maintains consistency among actors by including the same justices that appeared in *Morse v. Frederick* and *Kennedy v. Louisiana*. Chapter VII discusses the importance and implications of this study's findings and includes suggestions and recommendations for scholars, lawyers, and judges.

Mr. Chief Justice, I hope you haven't grown bored with the necessary details of this study. At its essence this research considers the potential implications of the rhetorical discursive interactions within oral arguments. If you believe that language

matters, and human communication has the ability to influence how other humans think and act, then the manner in which advocates and justices use language to communicate in the Courtroom is of crucial importance because you would want a fair consideration of both parties. My job in the upcoming chapters is to present you with compelling evidence that suggests communication matters, and that controlling communicative interactions in the courtroom is essential to fair proceedings and impartial consideration of a case.

I ask that you remember this study is not “scientific” in nature. I do not seek to prove a theory, or determine with certainty the influence of sensemaking, a task that would require crystal balls and a penchant for mind reading. Instead, this study applies a theory and method to reach reasonable conclusions that resonate with my observations before the Court, interviews with top advocates and former clerks, and moot Courts at Georgetown’s SCI and the National Association of Attorney Generals. It is true that I do not have a law degree, nor do I have the experience of serving as a judge or Supreme Court justice, but my education in research and communication makes me well equipped to study the Court’s interactions. To you, my scholarship may seem unrealistically idealistic, but if you can walk away considering that the interactions in oral argument are important to the decision making of the justices, and thus should occur in the most fair and balanced manner possible, then I will have been successful. If you have no further questions, I’ll reserve the remainder of my time and allow the research to make the case.

## CHAPTER II

### **DO ORAL ARGUMENTS BEFORE THE SUPREME COURT MATTER?**<sup>32</sup>

Chapter II begins with this crucial question because it is a common question addressed to scholars studying the Supreme Court that is based upon a misunderstanding of the influence of oral argument. I review the previous research in law, political science, and psychology to explain the theoretical and methodological differences that separate the fields, as well as revealing how each field answers this chapter's driving question. After providing a background to the three fields, I suggest an answer from a Communication perspective that includes using sensemaking theory to understand the importance of oral arguments, and their ability to influence judicial decision making. In articulating sensemaking's potential influence upon judicial decision making, I explain the drawbacks associated with the justices falling into patterns of sensemaking. Nearly every scholar studying oral arguments before the Supreme Court begins their study with this fundamental question for a couple of reasons. First, it is by far the most commonly asked question from both everyday citizens and members of the legal community, and should therefore be addressed in order to move forward with the study. Second, scholars answering this question not only justify their study of oral arguments (if oral arguments had no influence then their studies would matter little), but also answering this question enables researchers to approach oral argument from a particular

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<sup>32</sup> This question's phrasing derives from the numerous studies that begin by asking "do oral arguments matter?" What scholars mean in their use of the term "matter" is unclear and may contribute to the disagreement surrounding the influence of oral argument. I have adopted the ambiguous terminology to point out the wide interpretive latitude created by using the term "matter."

perspective. However, scholars do not agree on the manner in which oral arguments “matter.” Scholarly disagreement may result from indeterminate meaning surrounding the term “matter.” Some scholars use “matter” to refer to oral arguments ability to change a justice’s tentative voting position. Other scholars interpret “matter” to suggest the manner in which a justice understands a case, potentially resulting in an alteration of the written opinion and the resulting construction of law. The question’s interpretation often depends upon the scholarly context within which it is raised, and the answer also naturally derives from the scholar’s field of study. Three primary fields of research have attempted to answer this question. Members of the legal profession, political scientists, and psychologists have all sought to determine the influence and purpose of oral arguments, both at the Supreme Court and lower level appellate courts.

Each field produces distinctly unique studies because of the differences in the purpose of their research, goals, methodology, and theoretical approaches. Members of the legal profession often rely on personal accounts through the testimony of lawyers and judges on the importance of oral arguments. Psychologists tend to determine how judges may align with previously established models of human decision making by evaluating voting patterns and written opinions. Political scientists typically employ longitudinal studies to examine the voting records of judges and account for whether oral arguments may have influenced judges to shift from prior positions.

The purpose, influence, and effect of oral arguments have been examined largely by psychologists and political scientists through an identification of variables that may influence a justice’s voting pattern. These social scientists typically evaluate voting



records to establish prior judicial trends and separate themselves from their subjects of study as a means of establishing objective, verifiable, and replicable empirical truths.

Social scientists, by nature of their methods, must assume that every case elicits specific behavioral patterns from the justices, yet they fail to recognize that each case is unique and has the potential to draw forth unpredictable responses by the justices. In contrast to the perspective and methods of social scientists, members of the legal community tend to focus more upon human experience, often using interviews, speeches, and written comments as a means of verifying uniquely individual experience with a topic.

However, recalling human experience is also vulnerable to flaws in memory as well as an inability to recognize a pattern of behavior over a long time span. Each field's divergent path of research and methodology emphasizes unique advantages and limitations. Psychologists and political scientists' techniques generate knowledge which accounts for generalizable principles, but may not explain individual differences. As these social scientists approach their studies with a wide encompassing macro perspective to establish sweeping conclusions, members of the legal community take a micro approach and use individual perspectives to make specific contributions.

However, where psychologists or political scientists remain relatively separate from their object of study, members of the legal community are intimately associated with legal topics, and may lack critical distance to reach sound conclusions. The advantages and limitations of various approaches should not suggest the superiority of any particular field or methodology but rather expose the limited nature of knowledge.

Although all three fields provide perspectives which assist in more fully understanding the dynamism and complexity of oral argument before the Supreme Court, psychologists and political scientists are somewhat divided on the influence of oral arguments before the Supreme Court; however, the legal community largely believes in the importance of oral arguments. Members of the legal community oriented toward practical application of oral advocacy typically provide handbooks detailing how to effectively craft oral arguments, often including personal anecdotes and interviews with judges and justices to bolster their positions. This method may seem mundane and a self-justification of the legal profession and its rituals, but members of the legal community find through narratives and interviews that oral arguments do make a difference in cases. The importance of oral argument thwarts the conventional wisdom followed by political scientists. Members of the legal community believe oral arguments matter in the outcome of a case by creating a moment when lawyers' arguments bolster or diminish their client's position. Conversely, political scientists have advanced the most radical view of oral arguments by questioning whether oral arguments make a difference in a judge's decision making process. Although political scientists have not reached a consensus in this area, they largely believe that "oral arguments [do not] play a significant role in the decision making of the U.S. Supreme Court."<sup>33</sup> The literature review begins with studies by legal scholars, confronting their claims with views from

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<sup>33</sup> Kevin T. McGuire, "Oral Arguments and Decision Making on the United States Supreme Court, by Timothy Johnson" *Law and Politics Book Review* 15.2 (2005): 107-109. <http://www.bsos.umd.edu/gvpt/lpbr/> accessed 9/17/07.

political scientists and psychologists, and concluding by emphasizing the value that communication studies can provide to the analysis of oral arguments.

### **Legal Research**

Within the field of critical studies, legal scholars make a confident assumption: oral arguments matter, at least to an extent. Legal scholars who emphasize the importance of oral arguments generally do so in legal handbooks that provide suggestions for improving a lawyer's argumentation skills. Justice Scalia and Brian Garner's recent work *Making Your Case* reflects both the attitude of the legal community regarding oral arguments as well as the typical form of texts addressing the topic of oral arguments. Scalia and Garner's book never questions the value of oral arguments, recognizing the importance of oral argument from both men's experience in the courtroom. Their suggestions for oral argument occur in the form of a handbook which addresses topics such as "general principles of argumentation," and "legal reasoning."<sup>34</sup> The assumptions, methods, layout, and purpose of the book is markedly different from scholars in the field of psychology and political science, but reflects the general experience based approach which scholars in the legal community rely upon to make practical recommendations.

Two important handbooks that provide tips and draw from a unique wealth of experience are David Frederick's *Supreme Court and Oral Advocacy* and Ruggero J. Aldisert's *Winning on Appeal*. Frederick was an assistant to the Solicitor General for

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<sup>34</sup> Antonin Scalia and Bryan Garner, *Making Your Case: The Art of Persuading Judges* (West: St. Paul, 2008) xi-ii.

five years and Aldisert was a senior judge for the United States Third Circuit Court of Appeals. Both writers incorporate significant accounts of their experiences as well as those of other judges on various appellate courts, and they provide transcripts of both poor and exemplary arguments. Because judges and lawyers have distinctly different goals in oral argument, Aldisert and Frederick each contribute important insights into the purpose of oral argument. The authors' advice and meaningful explanation of a complex and multifaceted interaction largely accords with the position of other lawyers and judges.

According to Frederick, for lawyers and their clients, "oral argument can be critically important" because it represents the culmination and recognition of the legal work that has served as the foundation for the judicial process.<sup>35</sup> Through oral arguments, lawyers attempt to establish a narrative or sense of *ethos* through which judges may better understand and respond to their position.<sup>36</sup> As a judge, Aldisert also recognizes the value of oral argument for lawyers because the compressed time forces lawyers "to emphasize and simplify the pivotal issues of the brief" reducing a fifty page brief to a few arguments and addressing any questions or misgivings the judge may hold with regards to a case.<sup>37</sup> Advocates must look to "work [their] way into the judge's consciousness and make the judge think about the things that the advocate wishes him to think about. One of the best ways to begin this process is to establish eye contact with as

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<sup>35</sup> Frederick, *Supreme Court*, 8.

<sup>36</sup> Aldisert, *Winning on Appeal*, 32.

<sup>37</sup> Aldisert, *Winning on Appeal*, 32.

many judges as possible.”<sup>38</sup> In addition to connecting with a judge, advocates must also “attempt to stimulate the judge’s appreciation of the client’s point of view and to demonstrate the essential fallacy of the opponent’s position.”<sup>39</sup> Finally, oral argumentation should demonstrate the “logical soundness of [a lawyer’s] position” by enduring the tempering of judicial questioning and reflects the knowledge a lawyer has of his or her case.<sup>40</sup> A lawyer’s knowledge of a case makes them a valuable source of information for judges. As a source of information, advocates and judges may “jointly grapple with the difficult legal issues presented by the case that will affect the development of law,” and the lawyer plays a unique role in guiding and persuading judges to adopt a favorable course of action.<sup>41</sup>

Judges, like lawyers, may use oral arguments to clarify issues. Often times, a case involves hundreds, if not thousands, of pages of information and oral argument provides an opportunity to efficiently isolate the essence of a case. Justice Hughes remarked that oral argument “is a great saving of time of the court . . . to obtain the grasp of the case . . . and to be able to more quickly separate the wheat from the chaff. Our records in these days of typing are apt to be full of chaff.”<sup>42</sup> Oral argument presents

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<sup>38</sup> William H. Rehnquist, *The Supreme Court* (New York: Vintage, 1987) 279.

<sup>39</sup> Albert Tate Jr., “Federal Appellate Advocacy in the 1980s,” *American Journal of Trial Advocacy* 5.63 (1981) 79.

<sup>40</sup> Aldisert, *Winning on Appeal*, 33.

<sup>41</sup> Catherine Valerio Barrad, “Successful Oral Arguments do not Involve any Arguing,” *San Francisco Daily Journal*, (August 4, 2004) 5.

<sup>42</sup> Charles Evans Hughes, *The Supreme Court of the United States* (Columbia: Columbia UP, 1928) 61-62.

a key opportunity to foreground the crucial issue in a case and potentially shift a judge's position. Chief Justice Rehnquist remarked that

you could write hundreds of pages of briefs, and you are still never absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. Right there at the time of oral argument, you know that you do have an opportunity to engage or get into the judge's mental process.<sup>43</sup>

Because the Court's cases can become so materially voluminous, oral arguments may assist the justices in focusing upon singular issues within counsels' briefs rather than grow confused by the enormity of issues before them. Justice Brennan echoes Rehnquist's view of oral argument emphasizing the importance of oral argument by calling it an "indispensable ingredient of appellate advocacy" because "often my whole notion of what a case is about crystallizes at oral argument. This happens even though I read all the briefs before oral argument; indeed that is the practice now of all the members of the Supreme Court."<sup>44</sup> The opportunity by which a judge or justice may be able to clarify or isolate issues in a case depends upon "the advocate's ability to answer questions effectively and persuasively" and could have "a major impact on trials, [and] appellate arguments."<sup>45</sup> In oral argument, judges have the opportunity to clarify issues and problems in a case and lawyers have the rare chance to answer persuasively, but judges rely on oral arguments for more than simple record clarification.

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<sup>43</sup> Myron Bright, "The Power of the Spoken Word: In Defense of Oral Argument," *Iowa Law Review*, 72 (1986)36-37 (1986).

<sup>44</sup> William J. Brennan, *Harvard Law School Occasional Pamphlet* 9. 22-23 (1967).

<sup>45</sup> Douglas S. Levine, "Responding to Questions," *National Law Journal* 1, Jan. 2007, p. 20

Judges also rely on oral arguments to test the implications of their potential rulings. Judges must “clarify the scope of claims or defenses” by examining “the practical implications and defenses” of their rulings.<sup>46</sup> Judges will test a lawyer’s argument or logic by applying it to analogous situations. Interestingly, judges take the opportunity of oral argument to “talk to each other” by testing theories “to gauge the reactions of other justices without necessarily being committed to a particular viewpoint.”<sup>47</sup> At the Supreme Court, the justices “view the argument not as an occasion for speeches or a game of 20 questions, but rather as an initial conference convened to decide the case.”<sup>48</sup> Advocates serve as “a resource, providing information needed to clarify the thinking of the Justices; and to bring an organizing theme, emphasis, and note of drama needed to marshal the information in a meaningful way.”<sup>49</sup> In oral argument, judges or justices may advance perspectives to provoke a response from colleagues or to address a colleague through remarks to lawyers. The dynamic interactions between judges or justices may cause them to change their voting position. Although not Supreme Court justices, other judges have mentioned the influence of their colleagues’ interaction during the course of oral argument. Judge Frank Coffin has noted “how often I have begun argument with a clear idea of the strength or weakness of the decision being appealed, only to realize from a colleague’s questioning that there was much,

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<sup>46</sup> Ruggero Aldisert, *Winning on Appeal*, 31.

<sup>47</sup> David Frederick, *Supreme Court*, 5.

<sup>48</sup> Stephen M. Shapiro, “Questions, Answers, and Prepared Remarks,” *Litigation* 15 (Spring 1989) 33-34.

<sup>49</sup>) Stephen M. Shapiro, “Questions, Answers, and Prepared Remarks,” *Litigation* 15 (Spring 1989) 33-34.

much more to the case than met my eye.”<sup>50</sup> Judge Guest has also remarked that “I have known cases in which when the case started I was convinced that the appellant was either right or wrong and during the course of the case a point made either by me or by one of my colleagues has completely changed one’s view.”<sup>51</sup> For members of the legal community, oral argument plays a vital role in its ability to inform a judge’s understanding of a case and provide lawyers with an opportunity to distill the essence of a case from voluminous distracting elements. While members of the legal community view oral argument as important process in the review of a case, they also suggest that the power of oral argument is limited because it does not often have the ability to reverse a judge’s voting position.

### **Limitations of Oral Argument**

The legal community recognizes oral argument as a significant moment in a case, but the effects of a lawyer’s performance have long been debated. Some lawyers view oral argument as a perfunctory exercise which rarely reverses a judge’s initial voting position. These skeptical lawyers often rely on briefs to make the most persuasive argument. Like other skeptical lawyers, Chief Justice Roberts noted a shift in his regards for oral argument in his transition from lawyer to justice. As a lawyer Roberts “wasn’t as sure” that oral arguments were crucial in a case, but “as a justice, I know how very important oral argument is.”<sup>52</sup> His comment responds to the doubt in the legal

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<sup>50</sup> Frank M Coffin, *On Appeal :Courts, Lawyering and Judging* (New York: Norton, 1994) 133.

<sup>51</sup> Alan Paterson, *The Law Lords* (New York: Palgrave McMillan, 1982) 37.

<sup>52</sup> John Roberts, Ninth Circuit Judicial Conference. July 13, 2006.



community surrounding oral argument, and yet confirms the importance of oral argument from the perspective of a justice. Roberts' opinion reflects those of his colleagues at the Supreme Court and the justices who preceded him.

While it is true that “the majority of appellate cases” are “won or lost on the briefs,” “somewhere between 10%-35% of cases on appeal are won or lost on oral argument.”<sup>53</sup> However, oral argument should not simply be understood as a process to reverse a judge's voting position; lawyers should also consider how oral argument may be used to inform the resolution of a case in the client's best interest. Judges may not reverse a voting position, but may adopt a more favorable position based upon an advocate's argument. At the very least judges use oral argument to learn and clarify important information and may also rely on oral argument to assist them in writing the case's opinion and subsequently developing future laws. As evidence of oral argument's subtle yet powerful potential, two Eighth Circuit judges, Myron H. Bright and Richard S. Arnold, tracked all the cases that appeared before them in a ten month period asking themselves: “was oral argument necessary?”, “was oral argument helpful?”, and “did it change the judge's mind?”. Bright found oral argument necessary in 85% of the case, with 82% of oral arguments assisting the case, but changing his mind in only 7% of cases. Similarly Arnold determined that oral arguments proved necessary in 75% of cases, with oral arguments helping the case in 80% of cases, but only changing his mind in 2% of them.<sup>54</sup> Similar to Chief Justice Roberts experience as a justice, these judges'

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<sup>53</sup> Ryamond P. Ward, “The Importance of Earnest Oral Argument” *Certworthy*, summer 1999, 12.

<sup>54</sup> Myron H. Bright and Richard S. Arnold. “Oral Argument it may be Crucial!” *American Bar Association Journal* 70. Sept 1984, 68.

findings suggest oral argument's influence is more than simply changing votes.

Reducing oral argument's purpose to the reversal of a position, simplifies the complexity of the communicative process, and ignores the numerous purposes individual actors may bring to the process of oral arguments.

### **Influence on Decision Making Process**

At the Supreme Court level, oral argument is largely recognized as a crucial activity for justices, lawyers, and clients in the pursuit of justice and law. The Court considers oral argument so important that they are "reluctant to accept the submission of briefs without oral argument of any case in which . . . certiorari has been granted . . . the Court may require oral argument by the parties."<sup>55</sup> The Court's reluctance may largely be due to Justice Brennan's experience of oral argument in which "my whole notion of what a case is about crystallizes at oral argument."<sup>56</sup> Justice Harlan also lauded the effective role of oral argument while speaking to a young group of lawyers. He reminded them that "your oral argument on appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves. Oral argument is exciting and will return rich dividends if it is done well."<sup>57</sup> Justice Ginsburg and Chief Justice Rehnquist have also pointed out the significant influence oral arguments may have on a justice's consideration of a case. Justice Ginsburg has noted, "I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the

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<sup>55</sup> Supreme Court rule 38.1 1980.

<sup>56</sup> William J. Brennan, *Harvard Law School Occasional Pamphlet* 9. 22-23 (1967).

<sup>57</sup> John M. Harlan, "What part does Oral Argument Play in the Conduct of an Appeal?" *Cornell Law Quarterly* 41 6,11 (1955).

basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at oral argument.’’<sup>58</sup> Chief Justice Rehnquist has made similar statements about oral arguments mentioning that:

in a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about a case than I did when I came to the bench . . . the change is seldom a full one-hundred-and-eighty degree swing, and I find that it is most likely to occur in cases involving areas of law in which I am least familiar.<sup>59</sup>

The prior statements by justices highlight the importance of oral argument and demonstrate the close relationship legal briefs and oral arguments play in informing a justices’ understanding of the case. Where briefs serve to establish a judicial frame through which a judge tentatively understands a case, oral arguments assist the justices in confirming or reevaluating their initial pre-argument positions. The justices’ comments suggest that Supreme Court justices approach oral arguments with a tentative voting position, and oral arguments may potentially assist justices in writing and shaping the Court’s final opinion as justices explore potential avenues for resolving the current case and anticipate subsequent future cases. Chief Justice Rehnquist, and Justices Ginsburg and Brennan suggest that oral arguments may have a profound influence on the manner in which justices understand and evaluate a case. Oral arguments provide the opportunity for justices to confirm or reject their initial position by testing arguments and tentative positions. The examination of arguments could, in some instances, cause justices to change voting positions, but in all likelihood oral arguments help the justices

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<sup>58</sup> David Frederick, *Supreme Court*, 4.

<sup>59</sup> David Frederick, *Supreme Court*, 4.

confirm their preliminary voting positions. Former Chief Justice Hughes confirms this perspective noting ““the impression that a judge has at the close of a full oral argument accords with the conviction which controls his final vote.””<sup>60</sup> Legal handbooks typically recognize the limitation for oral argument to change a Supreme Court justice’s position entirely, but authors do acknowledge the importance of a strong presentation, noting that disaster often results from a poor one.

The opinions of Supreme Court justices, appellate judges, and experienced lawyers provide experience based perspectives that validate the importance of oral argument within the legal profession. Given the large variety of purposes for oral argument listed by justices, judges and lawyers, it seems unusual that such an important process would be reduced to only thirty minutes per counsel, but humans’ attention span is limited and can only be tightly focused for brief periods of time. Justices commonly struggle to maintain focus during mundane cases or oral arguments with very little interaction by the justices. Justice Ginsburg has fallen asleep during extended argument for the Texas redistricting case, woken after a number of minutes by a gentle hand from her friend Justice Souter.<sup>61</sup> In witnessing oral argument at the Supreme Court, observers grow aware of the very human qualities of the justices, such as their frailties, anger, irritation, and boredom. As the audience struggles to remain awake, the justices must remain alert and involved with the case before them. Furthermore, the limited time frame forces advocates to identify the key elements of a case and focus tightly upon

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<sup>60</sup> David Frederick, *Supreme Court*, 4.

<sup>61</sup> A variety of bloggers covered this piece but the major media outlets failed to mention it. See Whitlock, Scott., “Ginsburg Falls Asleep” *NewsBusters.org* 4/2/2006. [www.newsbusters.org](http://www.newsbusters.org). accessed 9/20/07.

those primary issues. An advocate's ability to concentrate their arguments, retain the justices' attention, and draw them into his or her argument through eye contact or vocal intonations may have a significant impact on the justices' ability to remember key issues surrounding a case. The rhetorical skills of an advocate in oral argument are crucial to the success or failure of a case, and there is little wonder why rhetorical suggestions largely comprise the bulk of legal handbooks. Although handbooks may not generally be regarded in academic circles as scholarly works, legal handbooks, similar to the suggestions of an ethnographer, contribute important experiential findings from judges and lawyers that point to the overwhelming importance of oral arguments.

### **Political Science Research**

The members of the legal community and authors of legal handbooks base their suggestions for oral argument on their experience and the belief that they do "matter" and can influence the outcome of a case. While members of the legal community anchor their beliefs about oral argument on reflections of personal experience, political scientists take a very different approach. Political scientists attempt to demonstrate, empirically and systematically, the influence of oral arguments, or lack thereof, by questioning the underlying premise that oral arguments matter. As with any important research, political scientists begin their studies by questioning the fundamental assumptions legal scholars take for granted. Largely dominating studies of the Supreme Court, political scientists have taken advantage of the relationship between the cause and effect of arguments and judicial decision making, particularly in regards to oral argumentation. A significant portion of political scientists traditionally believe oral

arguments make little difference in Supreme Court decision making.<sup>62</sup> Other political scientists argue that oral arguments do matter, but their influence is difficult to determine given the other variables' potential influence on the justices, such as the counsel's briefs, supporting *amicus curiae* briefs, intra-court negotiations, lawyers' experience, and the external political environment.<sup>63</sup>

Timothy Johnson is a recent prominent political scientist whose comprehensive research on the Supreme Court has led him to conclude that oral arguments do "matter" by influencing judicial decision making that leads justices to test policy options within the political environment.<sup>64</sup> In order to determine the importance of oral arguments,

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<sup>62</sup> See David W. Rhode and Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W.H. Freeman, 1976). Jeffrey A. Segal and Albert D. Cover, "Ideological values and Votes of U.S. Supreme Court Justices." *American Political Science Review* 83 (1989): 557-565. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge UP, 1993). Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge UP, 2002).

<sup>63</sup> Donald R. Songer and Stefanie A Lindquist, "Not the Whole Story: The Impact of Justice's Values on Supreme Court Decision Making" *American Journal of Political Science*. 40.4 (1996): 1049-63. Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth, "The Norm of Consensus on the U.S. Supreme Court"

*American Journal of Political Science*. 45.2 (2001): 362-377. Timothy R. Johnson, "Information, Oral Arguments, and Supreme Court Decision Making" *American Politics Research*. 29.4 (2001): 331-351. Timothy R. Johnson, *Oral Arguments and Decision Making on the United States Supreme Court* (Albany,

New York Press, 2004). Timothy R. Johnson, Paul J. Wahlbeck, and James F. Spriggs II "The Influence of Oral Arguments on the U.S. Supreme Court" *American Political Science Review*. 100.1 (2006):99-113.

McGuire, Kevin T. "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success" *The Journal of Politics* 57.1 (1995): 187-196. James N. Schubert, Steven A. Peterson, Glendon Schubert, and Stephen Wasby. "Observing Supreme Court Oral Argument: A Biosocial Approach" *Politics and Life Sciences*. 11.1 (1992): 35-51. Donald S. Cohen, "Judicial Predictability in the United States Supreme Court Advocacy: an Analysis of the Oral Argument" *University of Puget Sound Law Review*. Vol 2 (1978): 89-136. Paul M. Collins, "Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs" *Political Research Quarterly* 60.1 (2007): 55-70.

<sup>64</sup> For commentary on the influence of Johnson's study see book reviews by McGuire, Kevin T., "Oral Arguments . . ." *Law and Politics Book Review* 15.2 (2005): 107-109. and Barbara Palmer, "Oral Arguments and Decision Making on the United States Supreme Court" *Justice System Journal* Vol. 26 (2005): 245.

Johnson evaluated “litigant and *amicus* briefs, oral argument transcripts, notes and memoranda from the private papers of Supreme Court justices, and the final decision handed down” for cases handled in between years 1972 and 1986.<sup>65</sup> Johnson cleverly attempts to isolate the abundance of variables to determine the influence of oral arguments. As he isolates the origination point of certain arguments that may again appear in the final decisions, his study depends upon a certain understanding of human decision making and behavior.

Johnson’s study relies on fundamental assumptions of human behavior, which political scientists call the strategic actor model, to explain judicial behavior.<sup>66</sup> The strategic actor model has its roots in the rational actor model or rational choice theory, which proposes that humans weigh all possible options, before rationally choosing the best possible solution. Rational choice theory is “arguably the most popular and fastest growing theoretical orientation in contemporary political science.”<sup>67</sup> Over the years the rational actor model was modified to include the strategic actor model which recognizes

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<sup>65</sup> Johnson, *Oral Arguments* (2005): 17.

<sup>66</sup> The strategic actor model varies with each scientist who employs it, reflecting a process of sensemaking rather than rigid inquiry. For other uses of the strategic actor model in judicial inquiry see Lee Epstein and Jack Knight, *The Choice Justices Make* (Washington DC: Congressional Quarterly Press, 1998). William N. Eskridge, “Reneging on History? Playing the Court/Congress/President Civil Rights Game,” *California Law Review* 79 (1991): 613-84. William N. Eskridge, “Overriding the Supreme Court Statutory Interpretation Decisions,” *Yale Law Journal* 101 (1991): 331-417. John Ferejohn and Barry Weingast, “Limitation of Statutes: Strategic Statutory Interpretation,” *Georgetown Law Review* 80 (1992): 565-587. Raphael Gely and Pablo T. Spiller, “A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and *Grove City* Cases,” *Journal of Law, Economics, and Organizations* 6 (1990): 263-300. Forrest Maltzman, James F Spriggs, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: the Collegial Game* (New York: Cambridge UP, 2000).

<sup>67</sup> Paul K. MacDonald, “Useful Fiction or Miracle Maker: the Competing Epistemological Foundations of Rational Choice Theory,” *American Political Science Review* 97.4 (2003): 551.

that human decision making is constrained by a variety of factors.<sup>68</sup> Johnson believes the strategic actor model best represents the justices' decision making because "when making decisions, policy-oriented justices must account for the preferences of their immediate colleagues, the preferences of actors beyond the Court, and institutional norms and rules that might affect the decisions they can make."<sup>69</sup> Johnson also believes that "the main goal of most Supreme Court justices is the attainment of policy in line with their personal preferences."<sup>70</sup> He suggests, and proves to an extent, that justices strategically maneuver through the entire decision making process. Rightly claiming that if justices "simply voted for their most preferred outcomes, there would be no evidence of bargaining and accommodation behind the scenes of the decision-making process."<sup>71</sup> While justices seek to achieve policy in accordance to their personal commitments, how they achieve this policy is of crucial importance.

Under the strategic actor model, justices should gather as much information as possible in order to find the best possible solution in accordance with their preferences.

Johnson echoes this position stating:

The first tenet of the strategic account is that justices strive to achieve their most preferred policy objectives. To do so they need information about all the policy choices available to them. I posit that oral arguments provide a time for justices to gather this information by raising questions concerning legal principles the

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<sup>68</sup> Other scholars have expanded the strategic actor model to include the "bounded rationality model" "power and politics model," and the "Garbage Can model." For a more extensive discussion of connections to the rational actor model see Kathleen M Eisenhardt, "Strategic Decision and All that Jazz," *Business Strategy Review* 8.3 (1997): 1-3.

<sup>69</sup> Johnson, *Oral Arguments* (2005): 5.

<sup>70</sup> Johnson, *Oral Arguments* (2005): 5.

<sup>71</sup> Johnson, *Oral Arguments* (2005): 8.



Court should adopt, courses of action the Court should take, or a justice's beliefs about the content of a policy.<sup>72</sup>

For Johnson, oral arguments play the crucial role of informing justices of policy implications by exploring the consequences of various alternatives. He determines that justices' questions in oral argument will focus on policy issues 40% of the time and 31% will be questions related to the constitutionality of their position; over 70% of justices' questions will focus on either policy or constitutional matters.<sup>73</sup> Johnson also provides a few examples from oral argument transcripts to demonstrate how justices use oral argument for policy testing and exploring constitutional issues. Historically, Johnson's conclusions are important because they foreground the importance of oral argument before the Supreme Court as a valuable tool the justices use to gather information about a case. His study also establishes the strategic actor as one of the primary models for Supreme Court decision making.

Johnson's study leaves a number of questions as a consequence of his methods. First, Johnson's aggregate findings fail to account for individual differences in justices' decision making or approaches to oral argument. For example, Justice Scalia argues with counselors incessantly while Justice Thomas rarely engages in open debate, and it seems unlikely that both justices share a similar decision making process. Second, Johnson ignores whether justices treat counselors equally or seek balanced information, seemingly an important underlying indicator of the strategic actor model. Third, he overlooks the multiple voices of a case (litigant and amicus briefs, opinions of clerks,

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<sup>72</sup> Johnson, *Oral Arguments* (2005): 24.

<sup>73</sup> For a more extensive discussion see ch. 2 in Johnson, *Oral Arguments* (2005).

justices' conferences, and senior justice voting patterns) that could influence a justice's decision. A justice could be persuaded by an amicus brief to rule in favor of a litigant and use a frame provided by a counselor in oral argument to explain their ruling. A variety of pressures that cannot be accounted for influence the justices' thought process. Fourth, Johnson's use of the strategic actor model eschews substantial scholarly research that claims humans do not actually use the strategic actor model but invoke sensemaking instead to process information and make decisions.<sup>74</sup> More will be said about the theory of sensemaking, but briefly it suggests, in a complex situation where multiple outcomes are possible, humans seek to simplify their decision making process by eliminating variables which conflict with their personal life experiences. While Johnson may not have chosen a practical model of decision making, his reliance on only one model of human decision making, leaves his scholarship vulnerable to inquiries of more widely accepted and verifiable forms of decision making. Fifth, the ambiguous nature of the strategic actor model prevents a clear articulation of behavioral expectations in humans, potentially subsuming all human behavior and therefore capable of explaining none.<sup>75</sup> The strategic actor, as derived from rational choice theory, suffers from the same

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<sup>74</sup> On the influence and widespread use of Sensemaking see Dennis Gioia and Kumar Chittipeddi, "Sensemaking and Sensegiving in Strategic Change Initiation," *Strategic Management Journal* 12 433-448; Maryl Louis, "Surprise and Sensemaking: What newcomers experience in entering unfamiliar organizational settings," *Administrative Science Quarterly* 25 226-251; Maryl Louis and Robert Sutton, "Switching Cognitive Gears: from habits of mind to active thinking," *Human Relations* 44 55-76; William Starbuck and Frances Milliken, "Executives personal filters: What they notice and how they make sense," *The Executive Effect*. Donald Hambrick (ed). (Greenwich CY: JAI 1998); Karl Weick, *Making Sense of the Organization* (Malden, MA: Blackwell 2001); Karl Weick, *Sensemaking in Organizations* (Thousand Oaks, CA: Sage 1995).

<sup>75</sup> For a discussion of limitations of the strategic actor model see Segal, Jeffrey and Harold Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. (Cambridge: Cambridge UP, 2002): 312-320.

ambiguity where “theorists have not clearly articulated their epistemological positions and for this reason, their arguments in favor of rational choice theory are inconsistent, contradictory, and unpersuasive.”<sup>76</sup> Finally, ironically but perhaps most importantly, Johnson’s study on oral argument does not consider the dynamic role communication plays in the environment of oral arguments. His understanding of communication depends upon the eclipsed transmission model of communication in which interaction occurs between only two actors who use speech primarily to transmit information to one another. Johnson fails to consider the rhetorical nature of a justice asking questions or making statements to influence his or her colleagues. He also ignores the tone of justices’ statements and questions which may reveal more about a statement’s purpose than any other quality. Johnson’s study also fails to understand that each case presents unique situations and scenarios. Indeed, the Supreme Court rarely grants certiorari on a topic they have already ruled, and while cases may fall into similar legal categories (death penalty, abortion, freedom of speech, habeas corpus, etc ...) each case often presents unique circumstances that evoke different interactional responses among justices.

Johnson’s study relies on the strategic actor model in opposition to the attitudinal model which had previously dominated research on the Supreme Court. Political scientists Jeffrey Segal and Harold Spaeth have argued that Supreme Court justices base decisions “in light of facts of the case vis-à-vis the ideological attitudes and values of the

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<sup>76</sup> Paul K. MacDonald, “Useful Fiction or Miracle Maker: the Competing Epistemological Foundations of Rational Choice Theory,” *American Political Science Review* 97.4 (2003): 551.

justices.”<sup>77</sup> The attitudinal model, as Spaeth and Segal call it, claims that justices vote particular ways because they are “extremely conservative” or “extremely liberal.”<sup>78</sup> Scholars who apply the attitudinal model assume that all human behavior is goal oriented and when faced with a decision, individuals will make a choice from the available alternatives by selecting the course which best achieves the person’s ideological goals. The decisions an individual pursues “will depend upon his personal value system—the set of beliefs, attitudes, and values that disposes him to behave in a certain fashion,” and when applied to political contexts, these values serve as personal policy preferences. Because scholars studying the attitudinal model believe that a justice’s values are set and intractable over time, they reject the influence of oral argument on the justice’s decisions.<sup>79</sup> For scholars adopting the attitudinal model oral arguments do not “matter” because they fail to reverse a justice’s voting position. Although oral arguments may help justices situate their policy preferences and their written opinions, for scholars studying the attitudinal model, if oral arguments “matter,” then they would have the ability to change a justice’s mind.

Where the rational actor relied too heavily on reason, the attitudinal model relies too heavily on values, beliefs, and emotions, leaving no real room or explanation for a justice’s change over time. Nor does the attitudinal model explain how rulings may stand in opposition to an individual’s personal values or belief systems, such as a

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<sup>77</sup> Segal and Spaeth, *The Supreme Court* (2002): 86.

<sup>78</sup> Segal and Spaeth, *The Supreme Court* (2002): 86.

<sup>79</sup> Segal and Spaeth, *The Supreme Court* (2002):281.

Catholic judge who views abortion as immoral, but yet legally supports its Constitutional nature. The attitudinal model ignores how political contexts and personal policy preferences vary and shift in relationship to social and political environments. Justices Souter and Stevens were both believed to be conservative justices, but both men have become some of the Court's most liberal justices. These men's views changed during their time with the Court, but the attitudinal model does not account for change in humans' attitudes or belief systems. Scholars invoking the attitudinal model must attempt to account for the numerous variables that could influence a justice's decision in prior and future decisions and these variables appear nearly infinite (upbringing, political affiliation, law school, affiliation with legal organizations, prior opinions, professional background). Scholars using the attitudinal model may also overlook the important role of opinion formation in oral arguments. At times advocates with weak cases must consider how to mitigate the loss in a case, better known as "how to lose a case" in the legal community. In order to preserve a client's best interest, lawyers must be prepared to suggest a ruling which may cause their client to lose the case, but in a manner which cuts against the client in a minor manner. Therefore even if a justice is set to vote against a certain counsel and a lawyer's oral arguments does not persuade the justices to vote differently, a lawyer's arguments may still persuade the justices to rule narrowly against a party, in turn causing minimal damage to the client's case. And finally, those studying the attitudinal model, presuppose knowing a justice's voting position before that justice enters oral argument, an impossible feat in itself, and one where scholars

would not even be capable of obtaining reliable information to accurately assess a change in voting position.

Like Johnson's reaction to the attitudinal model, Spaeth and Segal, along with other Supreme Court scholars adopted the attitudinal model as a reaction to the classical legal model of Supreme Court decision making. In contrast to the attitudinal model, the legal model, or legal formalism, argues that justices use reason alone to address legal issues by investigating the facts of the case, judicial precedent, the plain meaning of statutes and, the issue's relationship to the Constitution and the framers' intentions. Although not a political scientist, Richard Posner's *How Judges Think* addresses the problems of formal legalism. Legalism proposes that judges determine law through the "reading of legal materials and performing logical operations" which would reveal the true path of the law.<sup>80</sup> In contrast to the attitudinal model which suggests that personal values provide justices with the means to select the desired course of resolution or judgment, formal legalism argues that judges use reason and the guidance of written law to resolve legal issues. Even though the legal model bears similarities to the antiquated and unrealistic rational actor model, formal legalism remains "the judiciary's 'official' theory. . . proclaimed most emphatically by Justices of the Supreme Court."<sup>81</sup> Through the process of formal legalism judges and justices must confront multiple rationalities, or multiple reasonable paths of resolution in a case. If the majority of lawyers "have precedents supporting them," cogently argue the case to show the societal interests in

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<sup>80</sup> Richard Posner, *How Judges Think* (Harvard UP: 2008): 42.

<sup>81</sup> Posner, *How Judges Think* (2008):41.

their favor, “and both sides typically allege that either the plain meaning of the Constitution and/or the intent of the framers supports its position,” then how are justices to reach a final decision?<sup>82</sup> Reason and rational consideration alone cannot eliminate equally compelling rational arguments.

Political scientists disagree on whether oral arguments matter, largely based upon the way in which each scholar understands and frames the term “matter.” Johnson believes oral arguments serve as a place for justices to test their policy preferences, and while they may not force a 180 degree change in a justice’s vote, they do help justices decide which policy to adopt in their opinion. Segal and Spaeth take an oppositional stance primarily due to their view that the “influence” of oral arguments lies in its ability to change a justice’s previous voting position. If oral arguments lack the ability to change a justice’s voting position, then the arguments do not matter. Ironically, neither the strategic actor, attitudinalist, or formal legalism, provide any explanation into the nature of communication within oral arguments, seemingly an essential area adopted models should address, particularly when examining the communication of the justices and lawyers. Oddly political scientists are not the only social scientists who ignore the role of communication in oral arguments; psychologists suffer from the same error.

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<sup>82</sup> Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge UP, 1993): 64-65.

## Psychology

The findings of psychologists have primarily been used in studies by political scientists to explain judicial and human decision making.<sup>83</sup> Although lacking a critical mass of scholarship on the Supreme Court, psychologist Lawrence Wrightsman has made significant contributions on the topic of oral argument before the Supreme Court.<sup>84</sup> His work on oral arguments derives from his general research on the Court and from his earlier research on lower courts.<sup>85</sup> Wrightsman's most recent work on oral arguments before the Supreme Court provides an interesting collection of information and studies on the Supreme Court, ranging from transcripts of interviews with experienced Supreme Court lawyers to informal studies conducted by Chief Justice John Roberts.<sup>86</sup> His scholarly collage raises a number of interesting questions about the Court, but the real substance of his research lies in his concluding study in which he suggests that justices cast votes in relationship to their ideological relationship to the case.

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<sup>83</sup> See Ziva Kunda, "The Case for Motivated Reasoning," *Psychology Bulletin* 108 (1990): 180.; Jeffrey Mondak, "Substantive and Procedural Aspects of Supreme Court Decision and Determinants of Institutional Approval," *American Politics Quarterly*, 19 (1991): 174.; Gregory Caldeira and James Gibson, "The Etiology of Public Support for the Supreme Court," *American Journal of Political Science*, 36 (1992): 635.; Sarah Levien Shullman "The illusion of devil's advocacy: How the justices of the Supreme Court foreshadow their decisions during oral argument," *Journal of Appellate Practice and Process*, 6 271-293.

<sup>84</sup> Lawrence S. Wrightsman, *The Psychology of the Supreme Court* (Oxford: Oxford UP, 2006); Lawrence S. Wrightsman, *Oral Arguments Before the Supreme Court* (Oxford: Oxford UP, 2008).

<sup>85</sup> Lawrence S. Wrightsman, *Judicial Decision Making: Is Psychology Relevant?* (New York: Kluwer Academic, 1999). Lawrence S. Wrightsman and Saul M. Kassim. *Confessions in the Courtroom* (Newbury Park, CA: Sage, 1993). Lawrence S. Wrightsman, Michael T. Nietzel, William H. Fortune, and Edith Greene *Psychology and the Legal System* (Pacific Grove, CA: Brooks/Cole, 1994).

<sup>86</sup> Lawrence Wrightsman, *Oral Arguments before the Supreme Court* (London: Oxford UP, 2008).



Wrightsmann's case study examines 24 cases from the October 2004 term, 12 cases reflecting potential ideological bias and 12 displaying no evidence of bias. He attempts to compare the oral arguments in ideological and non-ideological cases to develop a basis of comparison and reveal the influence of oral arguments. Wrightsmann considers ideological cases as those cases which "elicit predispositions to favor a particular side" because each case is "related to "basic values such as individuals' rights, states' rights, property rights, privacy, executive power, or other equally salient concerns."<sup>87</sup> Although he mentions that these values reflect "liberal" and "conservative" political positions, he fails to define in his perspective what those terms refer to. Wrightsmann believes that the political predisposition of justices will predict their behavior in oral arguments. If a case falls into an "ideological" category, then justices' questions will be "predictive" of their votes, while non-ideological cases will result in less predictive questions. He hypothesizes "justices will ask somewhat more questions to the advocate whose side they disagree with, if the justices had already formed an opinion," but Wrightsmann fails to explain why he holds this hypothesis.<sup>88</sup> It seems equally reasonable, if not more likely, that justices who have already formed an opinion will not ask many questions at all, because they have determined how they will rule in a case.

Wrightsmann's study is primarily concerned with the role of questions in oral arguments as a means of predicting a justice's vote. He finds that oral arguments do

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<sup>87</sup> Wrightsmann, *Oral Arguments* (2008): 37.

<sup>88</sup> Wrightsmann, *Oral Arguments* (2008): 137.

matter, “demonstrate[ing] that individual justices’ questions seem to be related to their eventual votes,” but “in only about half of the cases were more questions directed at the eventual losing side.”<sup>89</sup> But according to Wrightsman, oral arguments matter because they reveal justices predispositions and are therefore capable of predicting how justices will vote. While interesting, Wrightsman’s study reveals very little about Supreme Court oral arguments; his approach suffers from similar pitfalls found in research conducted by political scientists.

Scientific in nature, Wrightsman’s research focuses on the predictive nature of oral arguments, but no real practical utility lies in predicting the votes of justices after oral arguments. What good, scholarly or pragmatic, is accomplished if researchers can predict the votes of the justices following oral argument? Wrightsman never answers or addresses this question and I am also puzzled by the practical value found in predicting votes following oral argument. Perhaps even more puzzling to me is that when listening to or observing oral arguments predicting justices’ votes following oral argument is not necessarily difficult in cases that attract a significant amount of communicative interaction among the justices.<sup>90</sup> Interaction within oral arguments may reveal clearly established voting positions which justices may defend vigorously. I do not suggest that it is always possible to predict all nine voting positions, but typically it is obvious where six of the nine justices stand following oral argument. Wrightsman’s study could offer

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<sup>89</sup> Wrightsman, *Oral Arguments* (2008): 141.

<sup>90</sup> Andrew D. Martin, Kevin M. Quinn, Theodore W. Ruger, and Pauline T. Kim, “Competing Approaches to Predicting Supreme Court Decision Making,” *Perspectives on Politics* 2 (2004):1761.; Linda Greenhouse, “Press Room Predictions,” *Perspectives on Politics* 2. (2004): 761.; John G. Roberts, “Oral Argument and the Reemergence of a Supreme Court Bar” *Journal of Supreme Court History* 30, 68-81.

practical advice for lawyers or judges if it attempted to isolate unique elements in oral argument that shape justices' positions.

In addition, Wrightsman's methods, like those of political scientists, could also have been more attuned towards the subtle nature of communication. Even though Wrightsman attempted to collect and isolate "sympathetic" and "unsympathetic" questions, he overlooks collecting statements to either lawyers or other justices. A justice's statements may prove just as challenging to a counsel as questions.

Wrightsman also ignored listening to the tone in which justices asked questions, a key fault with his and other scholars' research on oral arguments. A justice's tone can often help identify the large variety of intentions surrounding a justice's statements or questions: "softball" arguments (arguments from a friendly justice who wants to present an opportunity for advocates to advance essential positions), "trap door" arguments (arguments intended to appear to assist an advocate's position but may trap an advocate in an un-seen position), investigative arguments (arguments designed to explore the limits of a position), inquisitive arguments (arguments questioning factual issues surrounding a case) and combative arguments (arguments from a justice attempting to destroy an advocate's position).<sup>91</sup> When justices ask a question or make a statement, listening to a justice's tone and if possible observing their body language will provide accurate indications revealing the intention behind their utterance. It seems ironic that Wrightsman's study attempts to evaluate the communication within oral arguments and

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<sup>91</sup> This is demonstrative and not an exhaustive list because the intentions of justices can vary widely between counsels and between cases.

yet he ignores the simple process of listening to a case to obtain more accurate findings. Finally, the Achilles' heel of longitudinal studies, Wrightsman is unable to provide us information about the behavior of individual justices, which could prove interesting in learning who may be controlling the flow and interaction within oral arguments.

### **Communication**

As a field, Communication has a wealth of research and theoretical approaches that can be applied to further illuminate oral arguments. Communication's practical nature and assortment of methods makes it an ideal field from which to approach and discuss the importance of oral arguments, from both a theoretical and pragmatic position. The field of Communication is largely concerned with improving communication between humans and is centered on providing suggestions for how humans should communicate in a situation. Political scientists and psychologists have ignored the practical application of their studies and the improvement of the legal community. These researchers have been more concerned about proving the dominance of their proposed models through "scientific" approaches, than attempting to pragmatically use their research to assist the legal community. Johnson's "strategic actor model" could include suggestions for lawyers to be prepared for policy questions by justices, which according to Johnson results in about 40% of the justices' questions. Based upon his own research, Johnson could suggest that lawyers foreground policy proposals in their oral arguments, preempting the need for justices' questions and maximizing argument time. Likewise, Wrightsman could suggest that lawyers attempt to mediate and control the number of questions justices ask them, or conversely attempt to

raise significant questions about their opponent's position, forcing their opposition to defend their case rather than advance an argument.

Communication contains two scholarly areas of study that could significantly inform the way researchers and practitioners understand and approach oral argument. Adopted for their valuable potential in this study, Rhetoric and Discourse Studies offer a perspective on language and discursive interaction that broadly evaluates persuasion and understanding in a variety of contexts in human communication. More will be said about these areas of study in the next chapter, but a brief overview should foreground the immediate usefulness of rhetoric and discourse studies in evaluation of Supreme Court oral arguments. As mentioned in the previous chapter, rhetoric considers the role of persuasion in a speaker's address by examining the development of arguments within the speech. Traditionally focusing on persuasion through argumentation in a single speaker's oratorical presentation and delivery, rhetoric rarely focuses upon the fluid and interactional structure of dialogues or active arguments between two or more people. On the other hand, discourse studies ignore a speaker's style and arguments, focusing instead on the process of dialogue between two or more parties. Often emphasizing the structural nature of interactions, discourse studies highlights the barriers that prevent or disrupt understanding between humans, which they consider to be the primary goal of human communication. In the study of Supreme Court oral arguments, rhetoric proves a useful approach because of its concern with persuasion and argumentation, and discourse studies lends its understanding of dialogic interaction to achieve understanding between humans. Clearly Supreme Court oral arguments represent a site where

persuasion, argumentation, and understanding are negotiated by the participants.

Rhetoric and discourse studies are obvious choices for the evaluation of oral arguments; however, these topics have never been applied to the study of oral arguments.

Although Communication is capable of significantly contributing to the study of oral arguments, Communication scholars have largely ignored the study of the Supreme Court's oral arguments, providing surface level research that lists the various purposes of oral argument and emphasizing the rhetorical skill lawyers require to navigate its shifting landscape. The two Communication related articles published on oral arguments before the Supreme Court describe the formidable rhetorical task lawyers are faced with. Milton Dickens and Ruth E. Schwartz examine how oral arguments in school desegregation cases influenced justices Marshall and Davis by comparing how each justice responded to and participated in the process.<sup>92</sup> Dickens and Schwartz foreground characteristics which separate the art of oral argumentation from other types of political communication and they emphasize the skills involved that lawyers need in order to navigate the justices' questions. Their research is the first of its kind to trace the transmission of arguments from oral arguments to briefs.

As Dickens and Schwartz articulate the skills necessary for lawyers to excel in oral arguments, Wasby et. al. describe the importance of oral argumentation in judicial decision making.<sup>93</sup> At the heart of oral argumentation are the questions put forth by

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<sup>92</sup> Milton Dickens and Ruth E. Schwartz, "Oral Argument before the Supreme Court: *Marshall v. Davis* in the school Segregation cases" *The Quarterly Journal of Speech*. 57.1 (1971): 32-42 .

<sup>93</sup> Stephen Wasby et al. "The Functions of Oral Argument at the U.S. Supreme Court" *The Quarterly Journal of Speech*. 62 (1976): 410-22.

justices which provide lawyers with the opportunity to persuade the justices. Wasby et al. call attention to the many purposes of oral argumentation through which justices test policy, challenge logic with analogies, persuade other justices of their reasonable positions, gather more information, clarify positions, and reduce cases to their essential arguments. They note that “for the lawyer, there is the reassurance that a case has been heard” as well as the ability “to concentrate on the points from his overall case he considers most important.”<sup>94</sup> For justices, oral arguments emphasize “the most important elements in the case,” but it also serves as a ritual which “legitimizes [their] function, provides new opportunity to communicate with his colleagues, and to obtain information about a case and clarification of points which may have been raised.”<sup>95</sup> However, of utmost importance to Wasby et al. is oral arguments ability to assist justices “in shaping the strategy he and his colleagues should follow” in resolving the case. Wasby et al. urge others to learn more about the Court’s communicative interactions, but their calls went unnoticed. These two works, both published in the *Quarterly Journal of Speech*, were the first of their kind to attempt a Communication style study of oral argumentation.<sup>96</sup>

Communication research concerning the Court’s oral arguments is limited in the contributions dedicated to understanding oral arguments, but prior research suggests that oral arguments matter because of their ability to influence how justices may resolve the

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<sup>94</sup> Wasby et. al, 422.

<sup>95</sup> Wasby et. al, 422.

<sup>96</sup> Ironically Stephen Wasby is a political scientist who published his findings in a communication related journal.

case in their opinions. While Communication studies may believe that oral arguments matter, they fail to emphasize the most significant consequences of oral arguments. Oral arguments impact how a justice thinks about a case, make a justice's position known to the Court's other members, and through the act of speaking, create belief about a position, instead of simply reflecting it. Oral arguments provide an interactional situation which influences a justice's evaluation in a case. Johnson's research finds that justices use oral arguments to explore policy options, but he fails to consider how discursive dynamics can impact what information and policy proposals are highlighted within oral arguments. If a proposal is left out of oral arguments, then how might that influence a case's resolution? Secondly, oral arguments provide a place where justices can make their positions known to the other justices, staking their claims to an argument, and potentially generating support. Thirdly, instead of viewing justice's speech as reflective of predispositions, speech should be considered as generative of a position. Although this may seem counterintuitive to the widely held belief that we think first and then speak, speech may also help us crystallize ideas or come to an understanding about a position. Speaking may help humans develop their thoughts, rather than simply reflecting apriori ideas. Justices reflect this tendency when they find that an opinion "won't write," meaning that they cannot write a justification for their voting position, often switching their vote as a result.

As a field, Communication calls attention to how symbolic communication influences decision making, foregrounding how interactional participation can influence communication, and in turn, the way in which a person thinks, feels, and understands the



world. Language and arguments play a crucial role in understanding and improving communication between humans. The method in which a researcher approaches communication is crucial to understanding language's function. Ironically, while research by political scientists and psychologists study oral arguments, most of these scholars fail to consider their interactional qualities, preferring instead to code them without understanding their context. For example, most scholars, such as Wrightsman and Johnson, only read and code transcripts, without ever listening to digital recordings of cases. Moreover, these scholars never give evidence of their firsthand observation of the Court; instead, their studies are distantly removed from the Court's actual discursive interaction. To be fair, previous studies conducted by political scientists and psychologists have attempted to collect vast amounts of information and may not be concerned with individual behavior or behavior within key cases. However, within Communication studies, understanding context is essential to understanding communication. Without understanding contextual cues, such as tone and voice intonation, researchers could easily overlook sarcastic or ironic statements in transcripts, coding them as genuine statements. Even an understanding of the physical courtroom and how justices interact with each other is crucial in understanding and interpreting communicative interaction. Without a significant amount of experience, researchers may come to rely on second hand views, while first hand observation may reveal a very different perspective.<sup>97</sup>

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<sup>97</sup> Justice Thomas is repeatedly criticized for his lack of involvement in oral argument, but my personal observations suggest that he remains active (flipping through briefs, speaking with Justice Breyer, or Kennedy), even while avoiding questions.

Studies by political scientists and psychologists have used longitudinal approaches, coding vast amounts of language and voting patterns in order to provide generalizable findings. Their findings often group all of the justices together and fail to account for individual or unique judicial behavior; in addition longitudinal findings cannot account for the unique elements informing each case. Communication research, on the other hand, often foregrounds the situational and unique context of varying participants, preventing actors from being overlooked or grouped together generically. While Communication scholars and members of the legal community share similar views and approaches to studying oral argument, members of the legal community tend to ignore prominent theories of communication. Few legal handbooks look to explain the importance of oral arguments, rather they assume, or provide anecdotal evidence, concerning the importance of oral arguments. Members of the legal community are also less concerned with the systematic study of communication and more concerned with providing effective strategies for other community members. However, the lack of a systematic approach may lead legal community members to overlook important aspects of communication that could prove useful to their cases.

Across the three primary fields of inquiry into oral argument before the Supreme Court, each area responds to the question “Do oral arguments before the Supreme Court matter?” a bit differently given their interpretation of “matters.” Members of the legal community and Communication scholars primarily approach oral arguments from a humanistic perspective. In this humanistic sense, oral arguments provide a context through which justices may not change their initial position when entering the argument

session, but justices may adopt a justification for their position or an argument frame that they otherwise would have overlooked. This slight change in their approach often results in drastically different legal procedures that can have compounding legal repercussions throughout society. Simply because a justice does not change their mind because of a lawyer's arguments, does not mean that lawyer has been ineffective, or that oral arguments are irrelevant in their influence upon justices' thinking. In contrast to the humanistic approach of Communication and legal scholars, political scientists and psychologists approach the examination of oral arguments from a scientific foundation in which they search for and attempt to isolate instances of direct cause and effect relationships between oral arguments and justices' voting patterns. Political scientists remain divided as to the influence of oral arguments, and recent psychology research seems to suggest that oral arguments do make a difference in a case, but only as a site that can be used to predict justice's votes in the case. The scholarly division between the influence of oral arguments largely depends upon the vantage point from which researchers study oral arguments.

Researchers, seeking to predict behavior through scientific methods that examine either direct cause and effect responses or that employ quantitative approaches, may not be approaching the subtle nature of oral arguments from the most ideal vantage point. Qualitative researchers who use personal experience and theories of communication may be better suited to study the dynamic roles oral arguments may play. As a method, scientific approaches cannot account for the inherent subtleties of language or language's diverse impact upon audiences, often overlooking important dimensions of

communication. For example, Lawrence Wrightsman attempts to compare the rate of interruptions in transcripts between counsels in order to determine the role of oral arguments; however, he ignores listening to the audio transcripts where he would have found a number of unmarked interruptions because the Court's transcription only records mid-sentence interruptions. Justices will regularly interrupt a lawyer who has finished a sentence, taken a breath, and before they can fully articulate the next word, a justice will interrupt them. This instance occurs frequently, is often not captured within the Court's transcripts, and is a prime example of the need for detailed attention, particularly when relying on data that has not been transcribed for academic purposes and lacks the necessary attention to communicative details. A lack of concern for language and attention towards language's subtle differences skews Wrightsman's results, perhaps without him ever realizing it. In addition to ill-suited methodological approaches, political scientists and psychologists do not provide pragmatic suggestions for the extension or application of their research. I do not mean to imply that their findings are not practical, because they often can be useful, but rather that previous Supreme Court studies that employ scientific methods often are not concerned with improving or shaping other areas of human development.

This study seeks to make practical suggestions for scholars, lawyers, and judges by considering a new a model of decision making that emphasizes the role of communication in the process of judicial decision making. It seems unusual that scholars studying Supreme Court oral arguments employ decision making models that overlook the role of communication, but as a consequence of one's discipline and field,

researchers outside the field of Communication may not have been exposed to decision making models that account for the role of human communication. To better inform researchers in their understanding of oral arguments, I suggest that scholars consider the adoption of a popular model of decision making within the field of Communication known as Sensemaking.

Where the strategic actor model suggests that humans approach solutions to problems in relatively systematic ways, Sensemaking suggests that humans employ cognitive commitments to reduce the ambiguity of an environment and information due to conflicting, excessive, uncertain, or undesirable information. Sensemaking suggests that humans use a combination of cognitive and social mechanisms to manage the ambiguity of an environment. Where the strategic actor may articulate universal human behavior, Sensemaking captures a wide range of human behavior within specific circumstances and proposes that in order to understand how humans “make sense” of the world, we should focus on how people selectively see and construct the world. As a process, Sensemaking can be both deliberate and unintentional, but at its core, it emphasizes the way in which communication enables people to frame problems and reach solutions. Sensemaking, as a theory of decision making, has been widely employed by scholars across a variety of fields, but Karl Weick’s studies of organizational communication has provided some of the greatest contributions to the role

communication plays in human decisions, and in explaining the way communication shapes how people understand the world.<sup>98</sup>

### **Sensemaking**

Karl Weick's work extends across the fields of Communication, Psychology, and Business management. Perhaps most famous for his work on sensemaking in organizations, Weick's findings have contributed to the significant diversity by which scholars adopt and use his theory of Sensemaking.<sup>99</sup> Although Sensemaking, as a theory, lacks an individual founder who could claim responsibility for its emergence, Karl Weick's contributions to the theory have made him one of the most prominent scholars on the topic. His work on sensemaking links the fields of Communication and Psychology, by suggesting that communication influences human cognition. Weick views the "symbolic process" of language as "central [to] sensemaking," because language, as a symbolic form of communication, constructs the world around and within

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<sup>98</sup> For a list of recent studies see Ruth Blatt, Marlys Christianson, and Kathleen Sutcliffe, "A Sensemaking Lens on Reliability," *Journal of Organizational Behavior* 27.7 (2006): 491-515. Angelique Du Toit, "Making Sense Through Coaching," *Journal of Management Development* 26.3 (2007): 282-291. David Henningsen, Mary Lynn Henningsen, and Jennifer Eden, "Examining the Symptoms of Group Think Retrospective Sensemaking," *Small Group Research* 37.1 (2006): 36-64. Quinetta Roberson, "Justice in Teams: The Activation and Role of Sensemaking in the Emergence of Justice Climates," *Organizational Behavior and Human Decision Processes* 100.2 (2006): 177-192. Sarah Tracy, Karen Myers, and Scott Clifton, "Cracking Jokes and Crafting Selves: Sensemaking and Identity Management among Human Service Worker," *Communication Monographs* 73.3 (2006): 491-515. Piers Myers, "Sexed up Intelligence or irresponsible reporting? The interplay of virtual communication and emotion in dispute sensemaking," *Human Relations* 60.4 (2007): 609-636. Victoria Uren, Simon Shum, and Michelle Bachler, "Sensemaking tools for Understanding Research Literature: Design, Implementation, and User Evaluation," *Interactional Journal of Human-Computer Studies* 64.5 (2006): 420-445.

<sup>99</sup> The action of sensemaking is a common everyday process and can be distinguished from the formalized conception of the theory of Sensemaking. In an attempt to distinguish between theory and process, I have capitalized Sensemaking when referring to the specific theory, and left sensemaking in lower case when addressing the everyday process. Similar to my distinction between the field of Communication and the process of communication.

us.<sup>100</sup> Weick acknowledges the surrounding material world, but he also recognizes the influential role communication plays in organizing human lives. Sensemaking requires the “symbolic process through which reality is created and sustained.”<sup>101</sup> Because communication frames how humans understand and interact with the world around them, its ubiquitous presence plays a key role in human understanding and thus proves vital to Sensemaking. Just as communication may be a product of individual and social acts, so too is Sensemaking “grounded in both individual and social activity.”<sup>102</sup> Communication in Sensemaking, while socially constitutive, does not “create from scratch,” but rather “reproduce[s] and transform[s]” like a Straussian bricoleur, borrowing past concepts and ideas to create a bricolage.<sup>103</sup> People depend upon previous social experiences and rely on communication to make sense of ambiguous environments they are faced with. In plain terms, people use their background and experience to order information in a manner that helps them understand the world.

Sensemaking requires a focus on human communication, because it often occurs in environments where there is no single “right” answer, but rather where multiple reasonable options exist that people must talk through to reach a resolution. Weick names these multiple reasonable options “equivocality,” because multiple voices call for

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<sup>100</sup> Karl Weick, *Making Sense of the Organization*, (2001) 11.

<sup>101</sup> Gareth Morgan, Peter J. Frost, and Louis Pondy, *Organizational Symbolism* (Greenwich, CT: JAI Press 1983), 19.

<sup>102</sup> Weick, *Sensemaking in Organizations*, (1995): 6.

<sup>103</sup> Weick, *Making Sense of the Organization*, (2001): 19.

an individual or group's attention and somehow these voices must be managed by a group. Humans use communication to

differentiate and determine the nature of the materials they are working with, have to look for a unifying order without any assurance that there is a pre-existing order in these materials, have to decide how to represent this order, and have to play indefinitely never knowing whether they have discovered a unifying order.<sup>104</sup>

Equivocal environments prove challenging because of the inherent ambiguity involved and the difficulty required to determine a specific path of resolution. Sensemaking suggests that individuals reduce equivocality, or the vast number of options before them, by relying on a person's preconceptions or judgments that have established commitments which will cause an actor to choose a course of action which best fits those commitments. Previous commitments or values will cause individuals to limit potential resolutions to those which appeal to their commitments. Instead of humans weighing and evaluating all options, people "make sense of the things by seeing a world on which they already imposed what they believe."<sup>105</sup> When presented with a problem, humans rely on these commitments, or what Weick calls "cognitive maps," "to set the boundaries of understanding from which we may determine how to correct errors or flaws."<sup>106</sup> However, this problem solving method and often its solution follows from our own personal preconceptions, rather than a collection of potential possibilities. Even more directly related to our preconceptions, we may first determine a solution or explanation

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<sup>104</sup> Weick, *Making Sense of the Organization*, (2001): 9.

<sup>105</sup> Weick, *Sensemaking in Organizations*, (1995): 15.

<sup>106</sup> Weick, *Making Sense of the Organization*, (2001): 9.



to a problem and then construct a narrative to make sense of how a variable error caused the problem. Juries often reach a decision through this process by starting with a verdict “and then render that outcome sensible by constructing a plausible story.”<sup>107</sup>

Commitments guide and shape how an actor interprets events and “constrain the meanings that people impose on streams of experience.”<sup>108</sup>

The physical act of speaking also plays a key role in the sensemaking process because the individual act of speaking to another individual or group can influence how the speaker thinks about and evaluates a situation. Weick provides an example of a young girl asking a profound question, to her father who has told her to be sure of her meaning before speaking; the young girl replies “How do I know what I think till I see what I say?”<sup>109</sup> The young girl’s comment reflects the importance speech serves for clarifying, ordering, and crystallizing human thought as humans look back retrospectively “to reconstruct predecisional histories” altering thoughts in accordance with the reactions of others or with the speaker’s own commitments and beliefs.<sup>110</sup> Anyone who has put thoughts on paper knows of the often shifting manner in which words and ideas are ordered, rarely does the first draft remain untouched. Famous writers John Updike and Daniel Boorstin have reflected on the importance writing plays in a human’s process of thought. Updike described writing as a process that “educates the writer as it goes along,” and Boorstin made a similar comment noting that “I write to

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<sup>107</sup> Weick, *Sensemaking in Organizations*, (1995): 11.

<sup>108</sup> Weick, *Making Sense of the Organization*, (2001): 28.

<sup>109</sup> Weick, *Sensemaking in Organizations*, (1995): 12.

<sup>110</sup> Weick, *Sensemaking in Organizations*, (1995): 12.

discover what I believe.” These writers’ insights reflect the discovery process humans often experience when writing. U.S. Circuit Judge Frank Coffin explains that in legal decisions writing “tells what’s wrong with the act of thinking.”<sup>111</sup> The process of writing relates directly to the process of speech as humans use the communication process to refine, revise, and structure their thoughts. Like Judge Coffin’s explanation of writing’s function, U.S. Circuit Judge Wade H. McCree has noted that “all of us have had seemingly brilliant ideas that turned out to be much less so when we attempted to put them on paper. Every conscientious judge has struggled and finally changed his mind when confronted with the ‘opinion that won’t write.’”<sup>112</sup> His comments resonate with justices who may change voting positions because the opinion “won’t write,” meaning that the justice authoring the opinion cannot find a Constitutional justification for their position, which may result in the authoring justice, and other justices, switching their vote, or altering the course of Constitutional justification. Weick’s suggestion that communication plays a valuable cognitive function for humans should not be surprising given the important role writing plays in the decision making process. Anyone who has practiced the delivery of a public speech may also realize the shifting nature of their speech as they begin to refine, revise, and structure their material. As justices wade through the complex nature of a case in an hour, communicative interaction can have a dramatic cognitive influence on the way in which a justice understands and evaluates a

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<sup>111</sup> Frank M. Coffin, *The Ways of a Judge: Views from the Federal Appellate Bench*, (New York: Houghton Mifflin, 1980): 57.

<sup>112</sup> Wade H. McCree, Jr., “Bureaucratic Justice: An Early Warning,” 129 *University of Pennsylvania Law Review* 777 (1981): 790-91.

case. Oral arguments provide a crucial moment for a justice “to know what [they] think” as they “see what [they] say.”<sup>113</sup> The physical speech process of oral arguments influences the cognitive frame by which a justice understands a case and is another reason oral arguments prove so important to the decision making process.

The public nature of oral argument also influences the role communication plays on the cognitive process humans use to make sense of information. Public communicative interaction causes people to commit to a certain position whether they mean to or not, because “each party’s action is public, [and] irrevocable.”<sup>114</sup> When an actor articulates a position, the group attributes that idea to the individual whether or not the individual holds that belief, generating a commitment for that individual regardless of his or her intention. The communicative interaction “occurs in a committing context and also generates its own commitments.”<sup>115</sup> At the Supreme Court when a justice offers up a potential path of resolution, the justices may begin to commit the justice to a certain position within the case. The justice’s speech commits them to a particular idea which then may cause them to defend the validity of that position because “the action becomes bound to both parties and a search for justification intensifies.”<sup>116</sup> The public action of committing to an idea and then justifying that idea through speech “exerts an effect on subsequent action,” which can lead actors to defend a position they may not have initially adhered to, because their pride prevents an overturning of their idea, or

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<sup>113</sup> A play on Weick’s quote from *Sensemaking in Organizations*, 12.

<sup>114</sup> Weick, *Making Sense of the Organization*, (2001): 15.

<sup>115</sup> Weick, *Making Sense of the Organization*, (2001): 15.

<sup>116</sup> Weick, *Making Sense of the Organization*, (2001): 15.

may cause an actor to defend a position so vehemently that they fail to consider other avenues.<sup>117</sup> According to Weick, “justifications can turn into preferences that control subsequent attention and action.”<sup>118</sup> A defense of the position by the actor may cause a cognitive shift which causes the actor to accept a position they did not originally accept, overlooking other courses of resolution. And for groups, justification may “encourage forceful, sustained action that can change demands, rather than adapt to them,” potentially causing other justices to align with positions that are vigorously defended.<sup>119</sup>

Finally communication in the sensemaking process can indicate whether humans have individually committed to a position before group consensus has been reached because “postdecision behavior differs markedly from predecision behavior.”<sup>120</sup> During the predecision stage “people pay equal attention to alternatives in an effort to reduce their ignorance,” but in the postdecision stage, human “commitments marshal forces that destroy the plausibility of alternatives . . . these forces are non-rational” and causes humans to “pay more attention to the alternatives they eventually reject” as they create challenges and arguments against opposing viewpoints.<sup>121</sup> Individuals who have not reached a decision will explore alternative options in an effort to gather information about competing positions, yet individuals who have made a decision will explore more heavily the position they will eventually reject, as a means of limiting equivocality and

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<sup>117</sup> Weick, *Making Sense of the Organization*, (2001): 23.

<sup>118</sup> Weick, *Making Sense of the Organization*, (2001): 24.

<sup>119</sup> Weick, *Making Sense of the Organization*, (2001): 161.

<sup>120</sup> Weick, *Making Sense of the Organization*, (2001): 24.

<sup>121</sup> Weick, *Making Sense of the Organization*, (2001): 25, 24.

preserving the integrity of their decision by noting flaws in competing positions. The connection to judicial behavior in oral arguments is somewhat obvious in that justices who explore both sides equally may reflect predecision behavior while justices who pursue one-sided questions may reveal postdecision behavior.

### **Sensemaking Pitfalls**

As a theory, Sensemaking does not necessarily consider the quality of humans' decisions, but rather seeks to explain the process of human decision making. Similarly Karl Weick does not typically evaluate Sensemaking as a positive or negative cognitive process, rather the majority of his scholarship focuses on capturing the process of sensemaking and articulating its nature. However, in one study, Weick attempts to explain how the communication process of wilderness firefighters resulted in nearly a complete outfit of firefighters, or thirteen men, perishing in an emergency situation. Weick's article suggests that the firefighters' "deficient sensemaking," created "positive illusions," causing them to ignore competing messages and eventually lead to their deaths.<sup>122</sup> Although Weick does not identify the characteristics of "deficient sensemaking," it is clear in his scholarship that "blindspots," occur in sensemaking because of an overreliance on personal commitments or cognitive maps.<sup>123</sup> According to Weick humans "don't see through concepts we see with them, and are sometimes

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<sup>122</sup> Karl Weick, "The Collapse of Sensemaking in Organizations: The Mann Gulch Disaster." *Administrative Science Quarterly*. 38.4 (1993): 636.

<sup>123</sup> See Weick *Making Sense of the Organization*, (2001): 13, and *Sensemaking in Organizations*, (1995): 2.

blinded by them.”<sup>124</sup> Humans’ cognitive maps enable us to understand and process information in a manner that makes sense to us, and yet these maps may also cause humans to overlook potential solutions.

While Weick has not elaborated upon the pitfalls of sensemaking, other scholars have; in a paper delivered to the CIA at the Sherman Kent Center for Intelligence Analysis, Warren Fishbein and Gregory Treverton examined the role of sensemaking during the analysis of Transnational Threats. Fishbein and Treverton have noted that cognitive maps, or what they call “mental models . . . allow individuals to give meaning to, and thus efficiently process” large amounts of data, but mental models may “cause us to overlook reject, or forget important incoming information that is not in accord with our expectations.”<sup>125</sup> Mental models influence how humans search information by “leading us to seek information that supports what we believe to be the case,” which has also been known as confirmatory bias.<sup>126</sup> Overturning mental models may be difficult because humans rely on past successes to inform their current approach and a shift in thought process may result in humans feeling an unnerving sense of loss of control. Avoiding the feelings associated with a loss of control, explains why experts in various fields “whose highly developed models allow them to make quick and accurate judgments most of the time, are often the most likely to cling to longstanding

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<sup>124</sup> Karl Weick and Kathleen Sutcliffe, “Mindfulness and the Quality of Organizational Attention,” *Organization Science* 17.4, 518.

<sup>125</sup> Warren Fishbein and Gregory Traverton, “Making Sense of Transnational Threats” The Sherman Kent Center for Intelligence Analysis. *Occasional Papers* 3.1 p. 8.

<sup>126</sup> Fishbein et al., “Making Sense of Transnational Threats,”8.

interpretation in the face of anomalous information” that can often lead to “astonishing misjudgments and misguided forecasts by bona fide experts.”<sup>127</sup> In connection with mental models, Fishbein and Traveron identify a host of other behavior related to commitments and cognitive maps, such as judgment bias-“tendency to judge the probability of an event by the availability of examples of similar types of events rather than by its mathematical probability,” cultural bias-“belief that individuals in other cultures will act or react similarly to the way we do,” motivational influences on thought- “desire to avoid addressing unpleasant issues,” group think-“desire for cohesion in small task groups ... imposes conformity on thinking,” and organizational lock-in- “organization as a whole ... primarily searches for and inevitably finds information consonant with prevailing ideas,” effectively engaging in confirmatory bias at the group level.<sup>128</sup> Fishbein and Traveron identify pitfalls related to mental models, but mental models are created by a process known as associative thought.

Nyanaponika Thera’s work distinguishes sensemaking behavior in a process she identifies as associative thinking in which humans interpret the world by “select[ing] certain distinctive marks” and associating the marks with our response to them.<sup>129</sup> When humans reencounter those marks, we “release a standard reaction,” which “makes it unnecessary for us to apply new effort and painstaking scrutiny to each step in a

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<sup>127</sup> Fishbein et al., “Making Sense of Transnational Threats,” 8.

<sup>128</sup> Fishbein et al., “Making Sense of Transnational Threats,” 8.

<sup>129</sup> Nyanaponika Thera, *The Power of Mindfulness*. Buddhist Publication Society. (Sri Lanka: 1997): 51.

sequence. The result is a great simplification in life.”<sup>130</sup> Although life may be cognitively simpler through associative thought it may “also bring grave dangers,” by “perpetuat[ing] and strengthen[ing] faulty or incomplete initial observations, errors of judgment, and emotional prejudices.”<sup>131</sup> Incomplete observations “may prove quite inadequate and entail grave consequences if mechanically applied to changed circumstances.”<sup>132</sup> Misguided associative thought can cause “a strong instinctive dislike” or connection to “things, places, or persons which in some way are merely reminiscent” of the pleasant or unpleasant experience.<sup>133</sup> Associative thought can cause humans to take mental shortcuts by relying on prior experiences.

Associative thinking and mental models both reflect behavior found in sensemaking because at the heart of all three theories lies the prominence of human commitments in decision making. As a theory, Sensemaking subsumes associative thought and mental models into its larger collection of behavior, but for Weick either a reliance on mental models or associative thinking points to the danger of “thoughtless, faulty, uncontrolled thinking” in the process of sensemaking.<sup>134</sup> Weick’s cure for poor sensemaking or an overt reliance on commitments is through a process he calls “mindfulness.”<sup>135</sup> He describes mindfulness as

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<sup>130</sup> Nyanaponika Thera, *The Power of Mindfulness*. Buddhist Publication Society. (Sri Lanka: 1997): 51.

<sup>131</sup> Nyanaponika Thera, *The Power of Mindfulness*. 52.

<sup>132</sup> Nyanaponika Thera, *The Power of Mindfulness*. 52.

<sup>133</sup> Nyanaponika Thera, *The Power of Mindfulness*. 52.

<sup>134</sup> Weick et al., “Mindfulness and the Quality of Organizational Attention,” 517.

<sup>135</sup> Karl Weick and Kathleen Sutcliffe, *Managing the Unexpected*. (San Francisco: Jossey-Bass, 2001).



the combination of ongoing scrutiny of existing expectations, continuous refinement and differentiation of expectations based on newer experiences, willingness and capability to invent new expectations that make sense of unprecedented events, a more nuanced appreciation of context and ways to deal with it, and identification of new dimensions of context that improve foresight and current functioning.<sup>136</sup>

Weick's description of mindfulness is somewhat idealistic in calling for humans to be prescient of their commitments and decisions at all times. His characterization resonates with the more common conceptions of "nonjudgmental observation, impartial watchfulness, goalless awareness, awareness of change," and the always popular "keep an open mind."<sup>137</sup> He believes mindfulness "weakens the tendency to simplify events into familiar events and strengthens the tendency to differentiate events into unfamiliar events" by capturing "unique particulars, i.e. differences, nuances, discrepancies, and outliers that slow the speed with which details are normalized."<sup>138</sup> Weick's application of mindfulness does not seem particularly useful in application, but his distinction between "mindfulness" and "thoughtless, faulty, uncontrolled thinking" is useful when distinguishing among types of sensemaking behavior that can be understood as positive or negative behavior.

This study is less concerned with the topic of mindfulness and more interested in identifying what might be characterized as negative or biased sensemaking behavior. Weick's distinction between two types of sensemaking behavior suggests that Sensemaking may attempt to explain a wide array of decision making behavior both

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<sup>136</sup> Weick et al., *Managing the Unexpected*. 42.

<sup>137</sup> Weick et al., "Mindfulness and the Quality of Organizational Attention," 518.

<sup>138</sup> Weick et al., "Mindfulness and the Quality of Organizational Attention," 518.

positive and negative. At one end, sensemakers may recognize their own commitments and beliefs and remain mindful of how these prejudgments may influence the consideration of opposing positions. These “mindful” sensemakers may rely on commitments to make sense of a situation, but prevent their commitments from excluding opposing positions. Mindful sensemakers continue to explore potential solutions to problems without being controlled by commitments, which enable them both to recognize a greater number of solutions, and reach a more fully considered position. In groups mindful sensemakers would remain aware that communication may negatively influence how others conceive of a problem, and welcome other perspectives. At the other end of the spectrum, “deficient” or “biased” sensemakers remain unaware of their commitments and the influence prejudgments have on their decisions. In addition, biased sensemakers may be aware of their commitments, recognize they are pursuing them, but do not recognize that communication influences others’ consideration. These “biased” sensemakers are controlled and influenced by their commitments, cannot consider opposing viewpoints, and potentially reach solutions that are limited by the scope of their consideration. Although not always creating negative results, biased sensemakers reflect a poor level of decision making, because ignoring all possible solutions may cause them to overlook superior alternatives. As biased sensemakers pursue solutions that appeal to prior commitments, they may also negatively influence how other members of a group evaluate solutions, because they may hinder the group’s consideration of potential alternatives.

Delineating between “mindful” and “biased” sensemakers requires researchers to pay particular attention to an actor’s communication. Mindful sensemakers will reflect a more balanced engagement of issues, whereas biased sensemakers should demonstrate an obvious preference for a specific course of action. For Weick, communication is the “action [that] effects cognition” and it influences human thought on both the individual and group level in complex and dynamic ways. Biased sensemakers will use communication, perhaps aggressively, to cognitively reinforce their own position as well as influence the positions of others. Mindful sensemakers will communicate more openly with others in order to engage in a sharing of information. Under Sensemaking, communication “leads the sensemaking process; it does not follow it,” in other words, communication does not reflect the decision making process, but rather generates the movement towards a decision. Following the communicative interaction of sensemakers becomes an important component of understanding an actor’s process of decision making. With the prominent role communication plays in oral arguments at the Supreme Court, oral arguments provide an opportunity to observe sensemaking in action. The justices and advocates’ communication shapes the sensemaking process and in turn the justices’ consideration of a case.

In summary of the vast landscape covered thus far, this chapter has identified a crucial question at the center of studies on Supreme Court oral arguments, foregrounded the primary fields focused on oral arguments, exposed the differences between how each field approaches the study of oral arguments, laid forth a preliminary case for the importance of studying oral arguments from a Communication vantage point, and

explained the basic theoretical decision making model adopted for this study. This chapter has hopefully provided readers with the necessary foundation for understanding the following chapters. In the next chapter, this study will attempt to lay forth a theory of judicial sensemaking by articulating specific behavior of sensemaking justices. Methodologically, the study will also diverge from previous scholars who remained detached from the text of oral arguments, and who did not give close attention to the discursive process. Rather than provide only a theory of decision making, the following chapter explains the practical implications, and dangers of justices implementing sensemaking in oral arguments.

### **CHAPTER III**

#### **NEW QUESTION: ORAL ARGUMENTS “MATTER,” BUT HOW?**

#### **PROPOSING A THEORY AND METHOD TO CAPTURE THE MADNESS**

The previous chapter provided an overview of the way in which various fields understood the role of oral argument before the Supreme Court, and sought to explain why various researchers may believe that oral arguments do or do not “matter” to a case. Previous researchers have adopted various decision making models to explain how justices approach oral argument, yet these popular models ironically ignore the role of communication in humans’ decision making process. As a model of decision making, Sensemaking may prove useful to researchers who study Supreme Court oral arguments because it emphasizes the important role communication plays in the decision making process. This chapter will build upon the previous explanation of Sensemaking by articulating what behavior sensemaking justices may display, and explaining why sensemaking may be an undesirable process of judicial decision making. Sensemaking will then be situated between two prominent areas of communication: Rhetoric and Discourse Analysis. Sensemaking’s connection to these areas of study leads to the adoption of a variety of methodological approaches in the study of oral arguments.

In chapter II I proposed that scholars studying oral argument should consider the theory of Sensemaking as an alternative model to understanding judicial behavior. My goal in this proposal is not to dispute or completely overturn other models of judicial decision making, but rather to suggest a more comprehensive model which theorizes the influence and importance of communication upon the human decision making process.

As a theory of decision making, Sensemaking's concern with language and communication makes it particularly well suited to contribute toward understanding another dimension of oral arguments before the Supreme Court. We have already discussed three theoretical models of human decision making adopted by prior scholars to understand the role of oral argument (strategic actor, attitudinal, and legalist). None of these models, nor do prior scholars in law, political science, and psychology consider the role communication plays in influencing a justice's decision making ability. I would like to propose the adoption of Sensemaking when evaluating Supreme Court oral arguments because of Sensemaking's emphasis upon the important role communication plays in the decision making process.

### **Why Sensemaking at the Supreme Court?**

Karl Weick's theory of Sensemaking follows a long history of psychological studies which suggest that humans respond to their personal commitments and seek to fulfill those commitments through the least amount of effort.<sup>139</sup> During the process of reaching a decision, theories of sensemaking propose that humans will avoid searching for all potential courses of action because that process makes it more difficult to reach a decision due, in part, to time limitations, and the cognitive difficulty involved in selecting the best course of action among similar possibilities. The process of sensemaking opposes fundamental assumptions the strategic actor model or the formal

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<sup>139</sup> For more broad applications of sensemaking see Gareth Morgan, Peter J. Frost, and Louis R. Pondy, *Organizational Symbolism* (Greenwich, CT: JAI Press, 1983), 3-35. Gerald R. Salanick and Jeffrey Pfeffer, "A social information processing approach to job attitudes and task design," *Administrative Science Quarterly* 23 (1978): 224-253. Dmitri N. Shalin, "Pragmatism and Social Interaction," *American Sociological Review* 51 (1986): 9-29.

legalism model relies upon, and most nearly accords with the attitudinal model of decision making. Although some scholars have advocated understanding Supreme Court justices as strategic actors or rational legalists, within oral arguments, justices' statements, arguments, and questions reveal at times a clear communicative emphasis and preferential treatment of counsels reflecting a process more nearly associated with sensemaking.<sup>140</sup> Scholars studying Supreme Court decision making should consider sensemaking as an alternative possibility for explaining how justices reach a decision because it emphasizes the importance of language in the process of decision making and explains behavior that lawyers and other justices can expect and react to. Previous models of decision making do not suggest how justices will respond in oral arguments, nor provide explanations of their behavior. The following section briefly revisits previous models of judicial decision making, and proposes why Sensemaking should be considered as an alternative theory of understanding judicial decision making, and thus emphasizes the importance of studying rhetorical discursive interaction in the Court's oral arguments.

Richard Posner's *How Judges Think* lists nine dominant theoretical positions for interpreting judicial behavior; however, three theoretical perspectives seem to dominate the scholarly literature surrounding oral arguments.<sup>141</sup> The formal legalist model is perhaps the oldest and most idealistic model of decision making applied to

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<sup>140</sup> By communicative emphasis I mean that justices will speak to and engage one counsel more than another, and they may assist one counsel by offering simple arguments or reframing a counsel's argument in a manner that is more amenable to the Court. An imbalanced focus and assistance of certain counsels can have an obvious impact on the manner in which justices understand a case.

<sup>141</sup> Richard Posner, *How Judges Think* (Cambridge, MA: Harvard UP, 2008).

understanding judges.<sup>142</sup> Under the legalist model, judges are described as impartial and objective when approaching a case, using the constitution, statutes and laws, and precedent to reach a judgment. The legalist model assumes our country's laws are always capable of determining "correct" answers to the legal questions brought before judges. Judges serve as completely rational, fully impartial humans who divine legal frameworks to determine the fated legal judgment in a case. "Of course, judges still subscribe to the legal model, at least for public consumption" because judges have a vested interest in the public believing that "it is law – and not the personal politics of individual judges – that controls judicial decision making."<sup>143</sup> However, humans can rarely separate their personal experiences from the decision making process, because they rely on the personal values, and life experiences that have shaped their perspective of the world in order to make their decisions. Judges may be influenced by the political or social bent of their law school, or their experiences growing up in wealth or poverty. All of a person's life experiences impact their understanding and evaluation of the world. It is impossible to fully separate engrained experiences from a person's decision making process.

In reaction to the idealistic legalist model, the attitudinal model suggests that justices are incapable of legal objectivity, and instead their personal emotions and values serve as the primary guide of their decisions. Where legalists advance rational

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<sup>142</sup> See Posner, *How Judges Think* p. 41-56 and Segal and Spaeth, *The Attitudinal Model Revisited*, 48-85.

<sup>143</sup> Segal and Spaeth, *The Attitudinal Model Revisited*, 48. And Harry T. Edwards, "Public Misconceptions Concerning the 'Politics' of Judging: Dispelling Some Myths About the D.C. Circuit," 56 *University of Colorado Law Review* 619 (1985) p.620.



objectivism as the primary means of decision making, attitudinalists argue for emotion's primacy in judicial decisions. Justices' "attitudes and values serve as filters" thereby causing "the decision maker to pay more attention to those arguments supporting his or her bias, while denigrating those arguments that do not."<sup>144</sup> In addition, attitudinalists suggest that values, and emotions resolve cases if each counsel has made equally compelling arguments based on the legal model. Faced with a situation of multiple legal equivocalities, justices must rely on their "ideological attitudes and values" to resolve the case's legal issues.<sup>145</sup> As a compromise between the emotional extremes of the attitudinal model and the rational objectivism of the legalist model, the strategic actor model has emerged. Chapter II spent a good deal of time discussing the strategic actor, so I will refrain from another lengthy explanation, but it is important to remember the contextual and emotional constraints that influence human decision making within the strategic actor model. The strategic actor model depicts justices as information gatherers who attempt to account for a variety of factors (political, societal, legal, and personal) in order to make their decision. Under the strategic actor model, emotions continue to play a role in decision making, but personal beliefs are balanced with contextual factors that could influence a justice's decision.

Each of these models provides researchers with unique approaches to understanding judicial decision making; however, these models often shift in their distinction according to each researcher, and each model has certain limitations which

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<sup>144</sup> Wrightsman, *Oral Arguments* (2008): 30.

<sup>145</sup> Segal and Spaeth, *The Supreme Court* (1993): 65.

make it ill suited to respond to particular issues. As models of decision making, the previous three perspectives are focused primarily on the end result of a decision or, in this instance, a judge's final vote, instead of focusing on the process that leads to the result, a key distinction in Sensemaking studies. The three perspectives view judges' votes as the result of their values, the political environment, or rational legal reasoning. Yet human decision making is often a messy affair and consists of numerous micro decisions that lead to the final decision, with the possibility that final decisions may be revised years later. Following the process of how humans make decisions, such as oral arguments, that lead towards a final decision, in this study the announcement of an opinion, can teach us more about how humans "make sense" of the complex decision making process and foreground areas of improvement. Studying the communication between humans sheds light on the decision making process. Justices' discussion of legal questions, or an advocate's ability to respond to a question or advance an argument would likely influence the way in which justices understand a case. The manner in which justices are exposed to and consider information in oral arguments could drastically affect their vote, yet decision making models often overlook the process of decision making and the role of communication within this process. In previous studies of oral argument, researchers often display a handful of statements by justices within oral arguments as evidence of predispositions or bias in a judges' decision making. In these instances, communication is solely reflective of an apriori belief, but researchers ignore the process by which oral arguments could be constructing justices' beliefs and judgments instead of only reflecting them.

As an alternative to previous models of judicial decision making, legal scholars should begin understanding judges as “sensemakers,” humans trying to make sense of the situation. Through the theory of Sensemaking, scholars “focus on process,” and “the ways [in which] people generate what they interpret” rather than emphasizing an actor’s relationship to their final decision.<sup>146</sup> Through his research into organizations, Weick’s study of sensemaking provides a number of benefits that other decision making models overlook.<sup>147</sup> In particular, Sensemaking foregrounds the role of discourse in the development of a person’s understanding. However, instead of language reflecting a person’s ideas, Weick suggests that the very act of speaking creates and sustains ideas, thus “invention . . . precedes interpretation.”<sup>148</sup> By employing the theory of Sensemaking, oral arguments shift from an environment reflective of symptomatic models of decision making, to a rhetorical discursive site; where, through justices’ interaction in oral arguments, justices create their own view of a case, making oral arguments a site “less about the discovery” and more “about the invention” of a position.<sup>149</sup> Therefore the process in reaching a decision becomes more important than the final decision, because how the process is conducted is largely responsible for the

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<sup>146</sup> Weick, *Sensemaking in Organizations*, 13.

<sup>147</sup> Karl Weick has widely used the term sensemaking to explain what psychologists call confirmatory bias, or other scholars have called it prospect theory. For discussions in psychology or economics see Kahneman, Daniel, Paul Slovic, and Amos Tversky. (Ed) *Judgments Under Certainty: Heuristics and Bias* (Boston: Cambridge UP, 1982). Kahneman, Daniel and Amos Tversky. *Choices, Values, and Frames* (Cambridge: Cambridge UP, 2002). This paper draws on Karl Weick’s theory of sensemaking but for other sources see references in the literature review section.

<sup>148</sup> Weick, *Sensemaking in Organizations*, 14.

<sup>149</sup> Weick, *Sensemaking in Organizations*, 13.

outcome of the product or judgment. Emphasizing the process of oral arguments foregrounds the importance of oral argument as a site of activity capable of both informing and shaping a justice's opinion, where the presentation of information, arguments, and ideas may have subtle but dramatic consequences in the approach to their final decision. If a justice is unable to pursue a line of questioning, then not only has their collection of information been hampered, but their ability to create and shape their opinion has also been limited. Simply put, the manner in which justices engage in oral arguments influences not only the information and arguments justices are exposed to, but also the ability of justices to formulate their own position.

In applying Karl Weick's notion of Sensemaking to Supreme Court decision making, I am not suggesting that Weick's Sensemaking should supplant other previous decision making models, but rather that Sensemaking can supplement our understanding of human decision making by uncovering previously overlooked rhetorical discursive interactions. The strategic actor model, for example, claims that justices gather all possible information and then select a decision which best reflects their preferred policy in relationship to potential constraints (in this case the political environment, Congress, who could overturn their decisions, or the President, who could ignore their judgments). However, the process of decision making is complex and may contain elements of both the strategic actor model and Sensemaking. An actor may weigh possible choices, but the selection of potential choices may depend on personal values; an actor's choice may be related more directly with their personal values than strategic considerations. Or the physical act of talking through a potential position in oral arguments, may lead a justice

to confirm their initial suspicions or alter a previously held position. As a theory, Sensemaking foregrounds the role of communication in the decision making process, making it an ideal model to improve our understanding of Supreme Court oral argument.

### **Theory of Judicial Sensemaking**

Weick's theory of Sensemaking contains numerous complexities related to social interaction among people. However, not all of his insights relate directly to the Supreme Court, and what I have explained previously, and will lay forth, is a concentrated distillation of Weick's understanding of sensemaking. As I have mentioned previously, Sensemaking, as a model for understanding oral arguments, excels when compared to other decision making models because it considers and evaluates the role of communication in the decision making process. Weick's understanding of communication extends past simple transmission models, adopted by other scholars studying the Court's arguments. Instead, Weick theorizes that communication plays a wide role in generating thought and belief rather than only reflecting it. Applied to the environment of oral arguments, Sensemaking offers a wealth of insight for understanding the importance of oral arguments, as well as the cognitive dangers associated with the process of sensemaking in group settings.

#### *The Complexities of Oral Arguments*

Weick's study of sensemaking as a communicative process in organizations can provide a window by which we may gain insight about the justices' decision making process when applied to Supreme Court oral arguments. While it is true that oral arguments represent a brief communicative moment in the justices' decision making

process, it is a crucial time in which justices crystallize their views, and occasionally change their minds, as earlier quotes have revealed. Justice Stevens has mentioned that “most of the time, by the time argument is over, I’m fairly well persuaded to one side or the other,” and Justice Scalia has also noted that “a persuasive counsel can persuade me that I ought to flip to this side rather than the other,” if I am “going into a case right on the knife’s edge.”<sup>150</sup> Whether a justice confirms his or her suspicions, reverses a voting position, or seeks direction from both counsels, the justice’s approach and treatment of oral arguments is crucial to understanding judicial decision making, and sensemaking can assist us in better understanding the process of oral arguments.

In addition to the formative role oral arguments may play in the justices’ understanding of a case, oral arguments are also the most public view of the decision making process by which the American public forms its opinion of the justices’ consideration of the case. Due to its public nature, at the very minimum, the Court should display behavior that indicates a fair and equal representation of a case. Justice Thomas has stated that “oral arguments should be a conversation with non-members of the Court. They should talk to the person. That person is not an enemy ... that person is participating in an important decision making process and I think they should be treated that way with respect and dignity we expect.”<sup>151</sup> He goes on to say that “the wonderful thing about oral argument is that people get to come to a final institution in our system and say their peace. ... I would love to have them leave this building saying ‘I said my

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<sup>150</sup> Antonin Scalia, “Supreme Court Interviews” *Lawprose.org* (2006): accessed 10/1/2008.

<sup>151</sup> Clarence Thomas, “Supreme Court Interviews” *Lawprose.org* (2006): accessed 10/1/2008.

peace’.”<sup>152</sup> And if the justices do not feel that they owe the public a display of fair behavior, this section will conclude with a list of dangers that may be created by judges who unwittingly rely on sensemaking.

The everyday mundane court case often requires judges or juries to face a complex environment full of ambiguity and competing perspectives. At the Supreme Court, justices take on an even more daunting task because previous lower courts may have disagreed about reasonable understandings of the case or lower courts may be confused about how to resolve constitutional issues. Cases accepted for review by the Supreme Court may contain numerous competing positions offered by advocates, and amicus curiae briefs in order to assist the Court in its decision. Oral argument serves as a site where justices may ask questions or test arguments in order to begin crystallizing their decisions in the case. The variety of “voices” both by the justices, and advocates, as well as counsels’ briefs and amicus curiae briefs all collide within oral argument; making oral argument the perfect environment for studying sensemaking, because multiple voices, or equivocality, compete for the justices’ attention.

In oral arguments, mindful sensemaking justices will look to explore and press each side relatively equally in order to prevent any unnecessary influence by commitments. Justices mindful of preconceptions should allow colleagues to pursue questioning and not engage in overly intense argumentation. This may sound like naïve idealism, but it is rather a practical expectation that justices be aware of their commitments and interact in oral arguments with the understanding that a justice’s

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<sup>152</sup> Thomas, “Supreme Court Interviews” (2006).

comments influence both the way the speaker and the other justices think about and evaluate a case. In general, justices should be mindful of their own biases and refrain from unduly influencing other justices. Why? Because at the highest level of decision making, the justices, lawyers, and the American public should expect an inquiry that explores all potential solutions, in order to make the best possible decision, the attainment and distribution of Justice.

In contrast to mindful justices, biased sensemaking justices will look to reduce “equivocality” and “introduce stability into an equivocal flow of events” by limiting the complexity and equivocality of potential arguments.<sup>153</sup> Biased sensemaking justices may simplify equivocality because of the overwhelming feeling created by multiple arguments, or because arguments may either appeal to or conflict with justices’ commitments. Justice’s commitments “‘marshall forces that destroy the plausibility of alternatives and remove their/(alternatives’) ability to inhibit action.’”<sup>154</sup> As justices’ commitments destroy challenging arguments, justices’ “commitments [also] elevate preferences and eliminate obstacles,” thereby guiding biased sensemaking justices to preferable alternatives.<sup>155</sup> As a site of significant debate, oral argument provides justices with the opportunity to reinforce, reaffirm, or confirm their commitments. A biased sensemaking justice will likely use commitments to limit exploration and simplify the decision making process, more heavily challenging or “pay[ing] more attention to the

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<sup>153</sup> Weick, *Making Sense of the Organization*, 15.

<sup>154</sup> Weick, *Making Sense of the Organization*, 25.

<sup>155</sup> Weick, *Making Sense of the Organization*, 25.



alternatives they eventually reject.”<sup>156</sup> Biased sensemaking justices will also look to advance arguments to influence their colleagues’ positions, and may aggressively attempt to dismantle an opposing counsel’s argument, both to confirm the justice’s own position, and to persuade the other justices to vote against the opposing counsel. Justices who employ biased sensemaking threaten the very foundation of judicial theory by making obvious their inability to fairly consider a case, and by exposing a clear preference for one side.

While biased sensemaking justices may attack counselors opposing their commitments, conversely it seems reasonable that justices would support the counselor with whom their commitments most align, but this support may come by way of silence or assistance in oral argument. Justices assisting counsels may ask simple questions to allow counsels to foreground important concepts, or may rescue counsels from disadvantageous arguments. Apart from personal commitments, biased sensemaking justices likely enter oral argument with preconceptions and prejudgments of how they will rule in the case because of issues identified in the case’s briefs. The biased sensemaking justice would likely have a judgment in mind that he or she would seek confirmation and support for through the correlating counselor. Justices using biased sensemaking would attack the counsel which presented an argument that opposed the justice’s commitments in order to limit equivocality or even publicly expose the flaws of the lawyer’s argument. Justices should champion counselors who support, or attack those who challenge, the justices’ commitments. Weick notes “that once a justification

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<sup>156</sup> Weick, *Making Sense of the Organization*, 24.

begins to form, it exerts effects on subsequent action,” and biased sensemaking justices may display communicative behavior that suggests prior formed justifications and exert their influence on arguments opposing or supporting a position.<sup>157</sup> Instead of using oral argument as a place to test arguments for the best possible choice that will eventually agree with justices’ personal values, biased sensemaking justices use oral argument to reinforce their commitments and convince themselves of the validity of their position. The action of oral argument tempers and strengthens biased justices’ convictions; their commitments have “created a self-fulfilling prophecy that builds confidence in the prophecy.” “Both the justification and the action mutually strengthen one another” so that justices reaffirm their principles as well as the judgment they were already considering delivering simply by participating in oral argument.<sup>158</sup> Preconceptions, commitments, and justifications can all play significant roles by influencing how justices judge cases.

Biased sensemaking justices may also vigorously pursue a position, intentionally or unintentionally due to an intense belief in, or strong dislike for, a position. While not entirely separate from equivocality, commitments, and cognitive justifications, justices’ communicative interaction in oral arguments can impact how they consider and evaluate a case, and at times arguments can grow intense between justices or between justices and advocates. The intensity by which justices pursue a position in oral arguments can also mentally influence them in the consideration of a case because “intense action ... enacts

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<sup>157</sup> Weick, *Making Sense of the Organization*, 23.

<sup>158</sup> Weick, *Making Sense of the Organization*, 25.

a portion of the environment people confront.”<sup>159</sup> If a justice vigorously pursues a particular position either in support for, or rejection of, an argument, then the sensemaking justice may inhibit the ability to see other potential alternatives. A justice’s “intensity guided by commitment can change the environment to resemble more closely the justification that was first imposed by it,” thus biased sensemaking justices may attempt to “impose” their view of the case on advocates and other justices by actively pursuing arguments that reflect favorable positions.<sup>160</sup>

Finally, and perhaps most importantly, oral arguments provide an environment where speech may influence cognition. In oral arguments, justices may “learn what [they] believe” or “know what [they] think” as they “see what [they] say,” by talking through ideas, revising, refining, and structuring concepts as they proceed. The communicative interaction in oral arguments proves essential to the decision making process as justices crystallize their beliefs, thus following and capturing the communicative process can provide a means of understanding how oral arguments may shape the manner in which justices understand a case. As Justice Scalia has mentioned, justices “don’t often have their minds changed by oral advocacy, but very often have their minds made up” by it.<sup>161</sup> Justice Stevens has also made a similar statement stating that “most of the time, by the time argument is over, I’m fairly well persuaded to one

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<sup>159</sup> Weick, *Making Sense of the Organization*, 25.

<sup>160</sup> Weick, *Making Sense of the Organization*, 25.

<sup>161</sup> Scalia, “Supreme Court Interviews” (2006).

side or the other.”<sup>162</sup> Both of these statements suggest that oral argument provides the justices with a crucial moment in which they crystallize their views of the case, and therefore places oral argument under serious scrutiny because the communicative interaction can have significant consequences for the manner in which a justice evaluates a case.

In summary of the behavior of biased sensemaking justices, we should expect to see justices heavily pursuing positions they will vote against, and actively support, or remain silent, on positions they support. Justices will display sensemaking behavior through communicative interactions with their colleagues and arguing advocates. While seemingly simple in premise (track how justice’s communicate), a sensemaking justice’s support or challenge for a position may take the form of: (1. disparities between the persistent interruptions counsels endure, (2. a large quantity of challenging or assisting statements, (3. a disparity in time by which justices challenge or assist advocates or the time in which justices allow advocates an opportunity to advance arguments or address questions, (4. the respect justices show toward arguments from both sides, and (5. the justices general treatment of both counsels. Lopsided communicative behavior in oral arguments (i.e. speech favorable toward one counsel and not another), may indicate the potential existence of biased sensemaking within a justices’ decision making process. But regardless of the cause of lopsided communication, a justice’s physical act of speech may influence his or her cognition, which makes the environment of oral argument a significant site where the justices’ consideration of a case may be formed and finalized.

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<sup>162</sup> John Paul Stevens, “Supreme Court Interviews” *Lawprose.org* (2006): accessed 10/1/2008.

The articulation of behavior by sensemaking justices may seem obvious to some, and I would agree that justices commonly treat advocates differently; however, it is important to remember that current models of decision making ignore communicative interactions in oral argument. Strange as it may seem, previous scholars of oral arguments have relied on decision making models that fail to consider the role of communication. Sensemaking foregrounds the importance of communicative interactions within oral arguments and provides an alternative model for understanding oral arguments. While Sensemaking highlights the role of communication in the decision making process, as a model it also helps expose the potential dangers and pitfalls associated with the process of sensemaking.

#### *Dangers of Judicial Sensemaking*

Because Sensemaking emphasizes the guiding role of a priori commitments, values, and emotions it is a less than ideal form of decision making for justices. Within the Court's architecture, the ubiquitous depiction of blind lady Justice with scales and sword in hand reveals the balanced and approach and objectivity by which the justices must consider a case in order to obtain justice for the parties involved. Justices unaware of the process of sensemaking may fail to consider how preconceptions may influence their understanding of a case and any communication involved about a case. Sensemaking justices, through their communicative interactions, may limit the consideration of alternatives, or may negatively influence how their colleagues understand the case. Justices relying on sensemaking present a real danger to the decision making process at the individual and group level because their communicative

interactions can negatively influence both their colleagues' consideration of the case as well as the sensemaking justice's understanding of the case. There are some obvious dangers resulting from sensemaking justices. (1). Before reaching a final decision, a justice may explore both sides of an issue but his or her commitments may lead towards a decision which accords with the justice personally rather than in strict legal terms. (2). Or a justice may heavily explore and challenge a disfavored position, only to reject it later, having wasted a counsel's, and the other justices' precious time. (3). An active sensemaking justice may prevent counsels from effectively presenting their arguments, hampering other justices' consideration of the case. (4). If a justice has already reached a final decision, he or she may seek to prove an advocate wrong that challenges their decision and conversely he or she may champion an advocate who aligns with their position. Justices employing sensemaking in the decision making process fail to systematically and objectively evaluate the case, allowing emotions and prior commitments to primarily shape their consideration of a case.

In addition to the guiding role emotions, and values may play in sensemaking justices' decision making process, justices may also reach decisions without listening to and weighing all potential arguments because of other prior commitments developed by institutional constraints and previous experience. Justices only have a limited amount of time to consider potential arguments and sensemaking may save them time and energy. In oral argument the justices only have 30 minutes by which they may explore an advocate's solution to a case. Justices may reach decisions through sensemaking because they do not want to expend a significant amount of time and energy dedicated to

resolving a certain case due to a variety of factors, such as the sheer volume of papers and arguments informing a case, approaching institutional deadlines, and other more socially significant cases. Justices may use their previous legal experience to frame and order a case's information and arguments in a certain manner. Justices repeatedly hear arguments concerning topics that have been tempered by decades of legal practice and have entrenched their perspectives. The justice's entrenched perspectives are unlikely to change and may prevent justices from fairly considering both issues of a case. Justices may also use their experience in sensemaking by having ready preconceived solutions, which may have resolved cases in the past, or hunches about how a case will and should develop, which may constrain an exploration of other possible options, thus making sensemaking a more time and energy efficient process, but in turn leading to a poorly evaluated case. Cognitively relying on commitments reduces numerous possibilities and reduces choices to those which best align with a justice's commitments, thereby minimizing an argument's complexity and limiting the confusion caused by multiple possibilities. Commitments are a valuable source for justices' decision making, because they assist in reducing the complexity of an argument, the time spent on determining a solution, and the confusion of multiple possibilities. However, commitments may cause the justices to overlook any systematic and balanced consideration of a case.

Sensemaking proves significant to understanding judicial decision making because it emphasizes the role communication plays in the process by which humans reach a decision. Sensemaking also foregrounds the role in which a variety of commitments may cognitively influence humans' decision making process. The

dynamics between communication and cognitive commitments are complex because communication may both reflect and create individual and group commitments.

Sensemaking may lead justices to poor decision making, causing them to overlook superior arguments or more preferable outcomes. At the individual level, sensemaking justices may skew how other justices understand a case, particularly within oral argument. On the group level, sensemaking justices may attack a counsel so vigorously that they prevent the advocate from capably articulating his or her argument. The justices may display a variety of communicative behavior in oral arguments, and while theory may help provide greater insight into the justices' interaction, sensemaking will be useless unless we can identify its presence in oral argument. The following sections include preliminary evidence of sensemaking from the justices' own reflections and accounts of their behavior in oral argument. Building upon the justices' testimony, I move into a discussion of the critical areas of communication studies related to the theory of Sensemaking. In order to study sensemaking, I propose two prevalent areas of communication studies that relate closely to sensemaking: discourse analysis and rhetorical criticism. Finally, the chapter concludes by explaining the methods adopted to study Supreme Court oral arguments and the benefits and consequences related to these methods.

### **Preliminary Evidence of Sensemaking**

As noted previously, Sensemaking is primarily concerned with explaining how humans determine a solution by making sense of a situation that contains numerous complex and reasonable variables. Oral arguments provide a unique site where



advocates present highly complex and reasonable arguments to the justices. Supreme Court justices have the unenviable task of determining which advocates' arguments align most closely with the Constitution, or the justice's desired preferences. Chief Justice Roberts describes the complexities surrounding a case when entering oral argument:

Some cases seem clear. You do go in with I'm kinda leaning this way; usually you've got concerns. . . . Even when you're tentatively leaning, you have issues you want to raise to give the other side a chance to sway you. Some cases you go in and you don't have a clue and you're really looking forward to the argument because you want a little degree of certainty. . . . Other cases you go in and there are competing certainties. The language seems pretty clear this way, but it really leads to some bad results. What are you going to do? Or, yes this precedent does seem to control, but this consequence is too troubling. . . . That's a much more typical situation going into oral argument.<sup>163</sup>

Interestingly, Chief Justice Roberts does not mention the Constitution in the articulation of his decision making process, perhaps because it is implicitly understood. Of course this does not mean the Constitution fails to play a role in his thought process, but his comments do reveal the highly complex arguments found within oral argument and the emotional and cognitive struggles resulting from those arguments. Justice Stevens has also noted the important role oral arguments play in making sense of a case. In response to Bryan Garner in which he asks Justice Stevens whether he ever leaves oral argument undecided about a case, Justice Stevens mentions that "most of the time when argument is over, I'm fairly well persuaded to one side or the other," which suggests the justices use oral argument as an opportunity to confirm initial suspicions or tentative commitments. As Chief Justice Brennan commented, "even though [we] have read all

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<sup>163</sup> John Roberts, "Supreme Court Interviews" *Lawprose.org* (2006): accessed 10/1/2008.

the briefs before oral argument,” a justice’s “whole notion of a case . . . crystallizes at oral argument.”<sup>164</sup> Rhetorical discursive interaction clearly plays an essential role in shaping the manner in which justices understand a case, and thus studying how justices and advocates interact in oral arguments is important in learning about how justices’ decision making processes are hindered or assisted by communicative interaction.

Oral argument clearly is a complex environment that justices use to make sense of a case, and sensemaking as a communicative interaction can be both an intentional and unintentional act. With the public’s expectation that justices remain impartial, it seems unlikely that judges and justices will admit to intentional adherence to their personal commitments. However, justices and judges do admit to the limited ability of oral argument to change completely their minds. Justice Antonin Scalia has described the unchanging nature of justices’ voting tendency when he stated ““to call our discussion of a case a conference is really a misnomer. It’s much more a statement of the views of each of the nine Justices.””<sup>165</sup> His characterization of oral argument as simply a statement of views may be one reason why Justice Scalia believes “judges don’t often have their minds changed by oral advocacy, but very often have their minds made up” by it.<sup>166</sup> Justices likely approach oral argument with a position in mind and then, through acts of sensemaking by way of discursive interaction, confirm their suspicions. Or justices’ legal philosophies may have been tempered by years of

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<sup>164</sup> William J. Brennan, *Harvard Law School Occasional Pamphlet* No. 9 22-23 (1967).

<sup>165</sup> David M. O’Brien, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability* (New York: Norton, 2000): 173.

<sup>166</sup> Scalia, “Supreme Court Interviews” (2006).

encountering similar legal principles year in and year out, and, as Chief Justice Rehnquist has noted ““it would be surprising if [justices] voted differently than they had the previous time.””<sup>167</sup> Justice Scalia and Chief Justice Rehnquist both note the entrenched nature of justices’ commitments that heavily influence their decision making, identifying a clear connection to basic principles of sensemaking.

As time tempered legal philosophies may influence the initial position a justice would support, briefs also play a role in presenting arguments that may sway justices to one side or another before entering argument. Justice Ginsburg reveals that she has ““seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of briefs.””<sup>168</sup> Justice Ginsburg’s statement emphasizes the nature by which justices approach questioning. Their readings of the brief have already influenced a particular decision, and they are in turn, unlikely to change their minds. Although not explicit in his reference to briefs, Chief Justice Rehnquist identifies that ““in a significant minority of cases in which I have heard oral argument, I have left the bench feeling differently than I did when I came on the bench...the change is seldom a full one-hundred and eighty degree swing.””<sup>169</sup> Chief Justice Rehnquist’s statement accords with Justice Ginsburg’s as he suggests that oral argument does not typically serve to change minds, and calls attention to the entrenched views of justices as they sit for oral arguments. Chief Justice Marshall had an even more cynical view of oral

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<sup>167</sup> David M. O’Brien, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability* (New York: Norton, 2000): 173.

<sup>168</sup> David Frederick, *Supreme Court*, 4.

<sup>169</sup> David Frederick, *Supreme Court*, 4.

argument when he described that it requires “the ability to look a lawyer straight in the eyes for two hours and not hear a damned word.”<sup>170</sup> Marshall’s frightening approach to oral argument highlights the potential irrelevancy it may have if justices lack the desire to gather further information.

Comments from the justices in this section suggest that oral arguments assist the justices in making sense of a case, either by confirming underlying commitments and tentative suspicions, or exploring and testing positions. The justices’ previous statements suggest that when approaching oral arguments, the justices often have a “champion,” or a counsel whom they favor, in mind. Justices may favor counsels for a variety of reasons that range from time-tempered legal philosophies to compelling brief writing, with commitments in mind, the foundation is set for justices to engage in sensemaking during oral arguments. Instead of equally exploring both sides, with a preferred counsel in mind, justices may be in a dangerous position of seeking reinforcement for their initial position through the support of a champion, by attacking a challenger, or dismissing competing arguments. To uncover sensemaking behavior, and the effect of justices’ rhetorical discursive interaction, this study adopts a variety of unique methodologies. The following section provides the necessary background to explain the adopted methodologies.

### **Critical Approach**

The methodology within this study relies on prominent areas of communication studies to inform the variety of approaches. As a theory, Sensemaking includes a vast

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<sup>170</sup> Alfred Beveridge, *The Life of John Marshall* 83 (1919).

number of psychological and communicative theories that have been interwoven to explain how humans make decisions. This study would become unmanageable if it attempted to account for all of the possibilities within sensemaking that could explain a justice's behavior in oral arguments. However, three areas of communication studies seem essential to understanding the role of sensemaking in the justices' discursive interactions, namely ethnography, rhetorical criticism, and discourse analysis.

Sensemaking behavior can range widely, but I have attempted to distill its qualities and focus them upon the environment of oral arguments by using ethnography, rhetorical criticism, and discourse analysis. Each critical approach offers its own unique contribution, and together form a process of triangulation that provides a more comprehensive view of sensemaking in the Court's rhetorical discursive interaction in oral arguments.

Weick's Sensemaking emphasizes the role of communication in decision making, but he ignores any specific approach to studying communication other than ethnography. Ethnographic experience can prove invaluable to researchers as they begin grasping the communication and culture found within environments. As ethnographers enter the field, they quickly begin to realize the unique situated role communication plays within social settings. Each culture, and often each communicative environment, contains its own norms, expectations, and behaviors that concomitantly shape both communication and culture. Ethnographers often study a group's communication first hand to learn more about both the culture, as well as the role communication plays in

constructing that culture.<sup>171</sup> Within the Supreme Court, oral argument is a very specific form of communication with its own rules and norms that govern the behavior of justices, lawyers, and audience members. Few researchers immerse themselves in the environment of oral argument and they lack an understanding of the communication between justices and lawyers. I spent a significant amount of time observing nearly fifty oral arguments and taking copious notes regarding the Court's rhetorical discursive interaction. Yet while ethnography provides insight into the cultural and communicative approaches within an environment, examining a group's particular communication requires more focused areas of study.

Building upon Weick's ethnographic approach to oral arguments, I rely upon two primary areas within the field of Communication, rhetoric and discourse studies. Sensemaking, Rhetoric, and Discourse studies all present dimensions of communication that focus upon unique areas of influence. Sensemaking foregrounds the crucial role communication plays in influencing human cognition. Rhetoric emphasizes the persuasive nature of communication, often by scrutinizing the arguments a speaker presents to an audience. Discourse studies highlight the process through which communication generates understanding and misunderstanding in people. Reducing complex areas of communication into tight descriptions invites disagreement. Scholars

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<sup>171</sup> Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1971); William Labov, *Language in the Inner City: Studies in the Black English Vernacular* (U of Pennsylvania Press 1972); Dell Hymes, "In vain I tried to tell you": *Essays in Native American Ethnopoetics* (U of Pennsylvania P. 1981); Cathy Kohler Riessman, *Narrative Analysis* (Sage 1993); Dennis Mumby, *Modernism, Postmodernism, and Communication studies: A rereading of an ongoing debate* 7.1 *Communication Theory* 1, 28 (1997); Nelson Phillips and Cynthia Hardy, *Discourse analysis: Investigating processes of social construction* (Sage 2002); Daniele M. Klapproth, *Narrative as social practice: Anglo-Western and Australian Aboriginal oral traditions* (Mouton de Gruyter 2004)

would likely agree that these communicative theories generally focus upon the areas I described, but note the theories often include much broader areas of study. Fostering further ambiguity, these three communication theories may overlap in some areas (persuasion may assist in achieving understanding, understanding may influence cognition), but they also identify uniquely particular dimensions of communication and inform each other's understanding of communication. Rhetoric is not typically concerned with a speaker's communication influencing their own ability to understand and judge opposing arguments, or in other words speech reinforcing commitments, and blurring impartiality. Discourse studies often ignore the manner in which the structure of arguments persuades an audience and subsequently influences their understanding. Joining these theories with Sensemaking foregrounds the importance of communication and its wide reaching ability to generate cognitive positions within speakers, persuade audiences, and create understanding. My integration of the term rhetorical discursive interaction is an attempt to draw attention to the multifaceted dimension of communication in the Court's oral arguments.

### *Rhetorical Criticism*

Persuasion is at the heart of communicative interaction in the Court's oral arguments.<sup>172</sup> Justice Kennedy has noted the inherent nature of rhetoric within oral arguments when emphasizing the importance of oral arguments:

of course [oral argument] makes a difference, it has to make a difference. That's the passion and the power and the poetry of the law. That

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<sup>172</sup> This explanation of rhetoric will be kept brief since the introduction spent a great deal of time discussing its history and development in relationship to legal rhetoric.

rhetorical case can make a difference because abstract principles have to be applied in real life situations.<sup>173</sup>

His statement suggests that rhetoric plays an essential role in making abstract principles come to life in oral arguments through the compelling and persuasive power of language and the law. Justice Kennedy's description of oral argument as a "rhetorical case," seems to align with Aristotle's conception of rhetoric. We have already emphasized Aristotle's definition of rhetoric as "as an ability, in each particular case, to see the available means of persuasion."<sup>174</sup> A more modern understanding of rhetoric can be found in Jim Kuypers' definition which he describes as "the strategic use of communication, oral or written, to achieve specifiable goals."<sup>175</sup> Kuypers' definition limits the domain of rhetoric to oral or written communication, but scholars commonly take a broader view. Sonya Foss characterizes rhetoric with an emphasis on the symbolic forms of communication, noting "rhetoric means the action humans perform when they use symbols for the purpose of communicating with one another."<sup>176</sup> These three definitions of rhetoric foreground crucial commonalities and distinctions. Aristotle and Kuypers both view rhetoric as a persuasive act, although Foss suggests rhetoric is human communication in all forms, visual, tactile, as well as oral and written. In this study, I limit rhetoric to a persuasive act, because narrowing rhetoric's domain allows

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<sup>173</sup> "The Supreme Court of the United States" York Associates Television, nd.-Video

<sup>174</sup> Aristotle. *On Rhetoric* p. 37

<sup>175</sup> Jim Kuypers, *The Art of Rhetorical Criticism* (Boston: Pearson, 2005).

<sup>176</sup> Sonya J. Foss, *Rhetorical Criticism: Exploration and Practice* (Prospect, IL: Waveland, 1996): 4.



me to integrate rhetorical criticism to focus upon the development of arguments and consider the consequences related to persuasion.<sup>177</sup>

The definition of rhetorical criticism, like rhetoric, varies by scholarly perspective, but it is generally concerned with examining how human communication achieves a certain situation, or as Kuypers put it, “a specifiable goal.” Typically criticism attempts to create understanding or make judgments. Wayne Brockriede calls criticism an “act of evaluating or analyzing experience . . . by passing judgment on the experience or analyzing it for the sake of a better understanding of that experience.”<sup>178</sup> Rhetorical criticism seeks to better understand the rhetorical process by “systematically investigating and explaining symbolic acts and artifacts.”<sup>179</sup> Typically, rhetorical critics analyze oral or written texts, at a distance, and focus on important metaphors or frames to explain the text’s persuasive message or argument. Rhetorical critics may examine the arrangements of arguments and themes within a speech or text to understand how the speaker intends to persuade his or her audience.

The study of argumentation has generated its own sub-field within rhetorical criticism, differentiating itself from rhetorical studies by focusing on the logical arrangements of arguments rather than other persuasive forms of appeal, such as emotion that rhetoric embraces. “Persuasion includes appeals based on both emotion and reason. . . . The study of argumentation focuses on how proof and reasoning are used to appeal to

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<sup>177</sup> Drawing boundaries around rhetoric’s focus also enables me to integrate techniques related to discourse analysis in order to account for the flow of communication and its influence upon human understanding.

<sup>178</sup> Wayne Brockriede, “Rhetorical Criticism as Argument,” *Quarterly Journal of Speech* 60 (April, 1974): 165.

<sup>179</sup> Sonya J. Foss, *Rhetorical Criticism: Exploration and Practice* (Prospect, IL: Waveland, 1996): 6.

the rational side of human nature.”<sup>180</sup> The foremost treatise on argumentation can be found in Chaim Perelman and Lucie Olbrechts-Tyteca’s *The New Rhetoric* where they distinguish persuasion in rhetoric from argumentation by suggesting that rhetoric “only claims validity for a particular audience, and the term convincing [applies] to argumentation that presumes to gain the adherence of every rational being.”<sup>181</sup> The distinction between argumentation and persuasion is not always so clear since “arguers are also persuaders. Persuasion is an attempt to move an audience to accept or identify with a particular point of view. Argumentation is the reasoning component of persuasion.”<sup>182</sup> Argumentation plays a primary role in the courtroom where emotional appeals are often frowned upon, but are not completely ineffective on juries. In the appellate courtroom, emotional appeals are rare, and argumentation between judge/justice and advocate follows a somewhat philosophical inquiry. Argumentation has long been the preferred form of inquiry where “practical eloquence, including judicial and deliberative genres, was the traditionally favored field of confrontation of litigants and politicians who defended, by argumentation, opposed and sometimes even contradictory theses.”<sup>183</sup> Argumentation within the American courtroom has followed a confrontational quality where parties in dispute may bring their arguments for judges

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<sup>180</sup> Karen C. Rybacki and Donald J. Rybacki, *Advocacy and Opposition: An Introduction to Argumentation* 5<sup>th</sup> ed. (New York: Allyn & Bacon, 2003), 4.

<sup>181</sup> Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*. Trans John Wilkinson and Purcell Weaver (South Bend: U of Notre Dame P, 1969), 28.

<sup>182</sup> Karen C. Rybacki and Donald J. Rybacki, *Advocacy and Opposition: An Introduction to Argumentation* 5<sup>th</sup> ed. (New York: Allyn & Bacon, 2003), 4.

<sup>183</sup> Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 45.

and juries to determine a victor. “The American tradition emphasizes a debate over two sides of an issue—a verbal competition. The two people, or sides, in a debate use the techniques of argumentation to convince someone, a judge or an audience, to accept one side over the other.”<sup>184</sup> The struggle within the American courtroom makes argumentation a key area of study; however Supreme Court oral arguments, and even the justices’ opinions do not always follow this competitive nature. While it is true that a victor often results from the Supreme Court’s decisions, oral arguments involve more than argumentation, and because of the complexity involved in the Court’s interactions, argumentation alone is insufficient to understanding the dynamic interactions in oral arguments. This study will consider argumentation part of the rhetorical analysis when examining oral arguments, but will also consider argumentation in relation to rhetoric, discourse analysis, and Sensemaking.<sup>185</sup>

Where scholars of rhetoric and argumentation agree is in the consequence of a speaker’s language and its persuasive effect in constructing the social and physical world. Communication much like rhetoric and “argumentation takes place all around us

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<sup>184</sup> Rybacki and Rybacki, *Advocacy and Opposition*, 1.

<sup>185</sup> For more on Argumentation see Richard D. Rieke and Malcolm O. Sillars, *Argumentation and Critical Decision Making*, 5<sup>th</sup> ed, (New York: Longman, 2001); Frans H. van Eemeren, Rob Grootendorst, and Francisca. S. Henkemans. *Fundamentals of Argumentation Theory*. (New Jersey: Erlbaum, 1996); Frans H. van Eemeren, and Rob Grootendorst. *Argumentation, Communication, and Fallacies: A Pragmatic Dialectical Perspective*. (New Jersey: Erlbaum, 1993); Douglas N. Walton, *Plausible Argument in Everyday Conversation*. (New York: State University of New York Press, 1992); Douglas N. Walton, *Practical Reasoning* (MD: Rowman and Littlefield, 1990); Robert L. Scott, “Argument as a Critical Art: Reforming Understanding,” *Argumentation* 1, (1987): 57-72; Robert C. Rowland, “On Defining Argument,” *Philosophy and Rhetoric* 20, (1987): 140-159; Wayne Brockriede, “Rhetorical Criticism as Argument,” *Quarterly Journal of Speech* 60 (April, 1974): 165.

in messages designed to influence our beliefs and behaviors.”<sup>186</sup> Both rhetoric and argumentation are forms of “instrumental communication relying on reasoning and proof” among other techniques “to influence belief or behavior through the use of spoken or written messages.”<sup>187</sup> Thus language and communication play a key role in constituting the physical and social world that surrounds us.<sup>188</sup> Understanding the implications of language through rhetorical criticism is essential to learning about how language and persuasion develops within oral argument. My own approach draws upon my ethnographic experience as a means of understanding the context within which persuasion develops. In applying my first hand understanding to actors and rhetorical interactions, I am able to observe or better gauge how the flow of arguments and information influences a counsel’s ability to persuade a justice, or a justice’s ability to persuade fellow justices. When analyzing transcripts, I am also sensitive to the manner in which justices may prevent or assist the development of an argument, thereby hindering or assisting in an argument’s persuasiveness. Rhetorical criticism, including argumentation, provides the critical attention necessary to reveal rhetoric’s persuasive power within oral arguments.

### *Discourse Studies*

While rhetoric and rhetorical criticism is primarily concerned with the study of persuasion, discourse studies focuses on the role of discourse to achieve understanding

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<sup>186</sup> Rybacki and Rybacki, *Advocacy and Opposition*, 3.

<sup>187</sup> Rybacki and Rybacki, *Advocacy and Opposition*, 3.

<sup>188</sup> For more on the influence of language and constraints that shape it see Lloyd Bitzer, “The Rhetorical Situation,” *Philosophy & Rhetoric* 1 (January 1968), Richard Vatz, “The Myth of the Rhetorical Situation,” *Philosophy & Rhetoric*. (1973) 6.3.

in human's lives.<sup>189</sup> As the meaning of rhetoric varies by scholar, so too does the meaning of "discourse." Scholars may describe discourse as "anything beyond the sentence," and this micro view may be contrasted by other scholars understanding of discourse as a macro view of a broad "conglomeration of linguistic and nonlinguistic social practices and ideological assumptions," such as the "discourse of power" or "discourse of racism."<sup>190</sup> Definitions and uses of discourse abound, but generally definitions fall into "three main categories . . . (1) anything beyond a sentence, (2) language use, (3) a broader range of social practice that includes non-linguistic and non-specific instances of language."<sup>191</sup> Scholars often distinguish between micro and macro uses of discourse by differentiating "Big D" from "little d."<sup>192</sup> Big D discourses are "embedded in a medley of social institutions," and little d discourses refer to "language-in-use or stretches of language (like conversations or stories)."<sup>193</sup> To complicate matters further, "language use" in oral or written form may involve both (d) and (D) discourse as conversations can reflect ideological positioning, as well as utterances beyond a sentence. This study will focus on oral argument as "language use" through a dialogue or conversation and will primarily be concerned with the interaction between speakers.

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<sup>189</sup> See Bakhtin, M. M. (1986) *Speech Genres and Other Late Essays*. Trans. by Vern W. McGee. Austin, Tx: University of Texas Press., David Bohm, *On Dialogue*. Ed. Lee Nichol. Routledge, London: 1996. Maranhão, Tullio (1990) *The Interpretation of Dialogue*. University of Chicago Press.

<sup>190</sup> Deborah Schiffrin, Deborah Tannen, Heidi Hamilton, "Introduction," *The Handbook of Discourse Analysis*. (Oxford: Blackwell, 2003): 1.

<sup>191</sup> Deborah Schiffrin, Deborah Tannen, Heidi Hamilton, "Introduction," *The Handbook of Discourse Analysis*. (Oxford: Blackwell, 2003): 1.

<sup>192</sup> Paul Gee, *An Introduction to Discourse Analysis*. (London: Routledge, 1999): 17.

<sup>193</sup> Paul Gee, *An Introduction to Discourse Analysis*. (London: Routledge, 1999): 17.

Since this study ignores “non linguistic and non specific instances” of language, the analysis conducted could be more closely aligned with (d) discourse.

Examining oral argument as a dialogue may seem unusual to readers, but the speech patterns between participants relates closely to an active conversation, because interruptions occur frequently, deference is shown toward senior members, lines of thought grow frayed as each speaker begins pursuing their own interest, and actors take turns speaking to one another. Justice Kennedy has confirmed that oral argument typically reflects the qualities of a dialogue:

When the people come in this room, the public, to see our arguments. They often see a dialogue between the justices asking the questions and the attorney answering it. And they think of the argument as a series of these dialogues, it isn't that. . . .What is happening is the Court is having a conversation with itself through the intermediary of the attorney.<sup>194</sup>

Justice Kennedy has not been the only person to characterize oral arguments in this manner. Former Solicitor General, Drew Days III, has also described oral argument as “nine people and yourself having a conversation.”<sup>195</sup> Because oral argument displays qualities of a dialogue, and participants have characterized the activity as a dialogue, it seems reasonable to approach the study of oral arguments as a dialogue through the analysis techniques developed within discourse studies.

Where discourse studies focuses on human understanding, discourse analysis offers techniques to study discourse and then considers the social repercussions of the discourse under scrutiny. Discourse analysis “focuses on the properties of what people

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<sup>194</sup> “The Supreme Court of the United States” York Associates Television, nd.-Video

<sup>195</sup> “The Supreme Court of the United States” York Associates Television, nd.-Video

say or write in order to accomplish social, political or cultural acts . . . within the broader frameworks of societal structure and culture.”<sup>196</sup> Discourse analysis shares a similar concern with rhetorical criticism in that both areas of study attend to communication’s constitutive social nature. Discourse analysis tends to focus on speech, rather than written text, emphasizing “both the processes and the products of communication [in all its forms], including its cultural embeddedness and social consequences.”<sup>197</sup> Studying the everyday communicative interaction is an essential part of understanding a group’s discourse, and of providing recommendations for improving communication. Rhetorical criticism also considers the process and product of communication, but it does not typically actively seek to identify problems and recommend solutions. “The goal” of discourse analysis “is to analyze, understand or solve problems relating to practical action in real-life contexts.”<sup>198</sup> Because human “cognition has a social dimension and is acquired, used and changed in verbal and other forms of interaction,” discourse influences humans’ understanding of the world around them.<sup>199</sup> Discourse’s cognitive dimension causes many researchers to employ discourse analysis as an approach to study and resolve problems related to communication. Discourse analysts, like sensemaking researchers, focus on human use of dialogue to “make sense of what is said” or “how

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<sup>196</sup> Teun A. van Dijk, “Discourse as Interaction in Society” *Discourse as Social Interaction* vol 2. Ed. Teun A. van Dijk. (London: Sage, 1997): 1.

<sup>197</sup> Shoshana Blum-Kulka, “Discourse Pragmatics” *Discourse as Social Interaction* vol 2. Ed. Teun A. van Dijk. (London: Sage, 1997): 38.

<sup>198</sup> Britt-Louise Gunnarsson, “Applied Discourse Analysis.” *Discourse as Social Interaction* vol 2. Ed. Teun A. van Dijk. (London: Sage, 1997): 285.

<sup>199</sup> Teun A. van Dijk, “Discourse as Interaction in Society” *Discourse as Social Interaction* vol 2. Ed. Teun A. van Dijk. (London: Sage, 1997): 3.

people in society produce [speech to] make sense of the world about them,” in order to identify problems and suggest solutions.<sup>200</sup> Although discourse analysts “may identify different acts or social functions at various levels” of analysis, they realize speakers often commit various spoken acts “sometimes even without being aware of that,” because of previous speech patterns humans have learned and replicated.<sup>201</sup>

In studying speech, discourse analysis calls for researchers to pay close attention to “speaker’s packaging of actions,” as a means of understanding how speaker’s “selection of reference terms provides for certain understandings for the actions performed and matter talked about.”<sup>202</sup> In other words, discourse analysts must scrutinize how speakers may organize speech in terms that produce certain understandings in dialogue participants. The methods discourse analysts adopt ranges broadly, but tends to emphasize a systematic approach reflective of its relationship to linguistics. Where rhetorical criticism predominantly examines texts through a humanistic frame (interpretive concern for philosophy, literature, and politics among others), discourse analysis approaches texts through a social scientific background (focus on the systematic study of human social groups).

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<sup>200</sup> Shoshana Blum-Kulka, “Discourse Pragmatics” *Discourse as Social Interaction* vol 2. Ed. Teun A. van Dijk. (London: Sage, 1997): 40.; Anita Pomerantz and B.J. Fehr, “Conversation Analysis: An Approach to the study of Social Action as Sense Making Practices” *Discourse as Social Interaction* vol 2. Ed. Teun A. van Dijk. (London: Sage, 1997): 65.

<sup>201</sup> Teun A. van Dijk, “Discourse as Interaction in Society” *Discourse as Social Interaction* vol 2. Ed. Teun A. van Dijk. (London: Sage, 1997):5.

<sup>202</sup> Anita Pomerantz and B.J. Fehr, “Conversation Analysis: An Approach to the study of Social Action as Sense Making Practices” *Discourse as Social Interaction* vol 2. Ed. Teun A. van Dijk. (London: Sage, 1997): 66.



Two linguists figure prominently in the methods commonly used by discourse analysts: John L. Austin and John R. Searle. Austin proposed that human speech is an action and must take place under certain contextual situations. He developed a theory upon “speech acts” which proposed that every utterance performs locutionary and illocutionary acts. Locutionary acts formulate sentences with a specific sense and reference, while illocutionary acts perform a communicative function. The locutionary act aligns with what is “said” by the speaker, while the illocutionary act is what the speaker “does” in using a linguistic expression.<sup>203</sup> Searle expanded on Austin’s theory by systematizing speech acts, specifying further categories and acknowledging indirect speech acts. Searle proposed speech acts may be grouped into five main types: representatives (describe a state of affairs), directives (makes listener act), commissives (commit hearer to action), expressive (characterize the psychological state of hearer), and declarations (effects a change in state of affairs).<sup>204</sup> The accuracy or validity of Searle and Austin’s work is not at issue here, but scholars would agree that the typologies created by Austin and Searle enabled researchers to begin classifying speech acts within dialogues and gain a better understanding of the dynamic and multi-layers of communication that exist within conversations. Speech act theory recognizes that “linguistic expressions have the capacity to perform certain actions such as making statements, [and] asking questions,” and it provides discourse analysts with “a

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<sup>203</sup> See John J. Austin, *How to do Things with Words*, (Cambridge: Harvard UP, 1962).

<sup>204</sup> See John R. Searle, *Speech Acts: An essay in the philosophy of language* (Cambridge: Cambridge UP, 1969). John R. Searle, *Studies in the Theory of Speech Acts* (Cambridge: Cambridge UP, 1975).

systematic classification of such communicative intentions and the ways in which they are linguistically encoded in context.”<sup>205</sup>

Other prominent systematic approaches consider the sequence, structure, frequency, and topic of interactions within dialogues. Emanuel Schegloff has focused his research heavily upon studying the structure and routine of interaction within dialogues. He and his colleagues were some of the first to identify the “turns” people “take” when conversing with one another. Along with the rhythm associated with “turn-taking,” they also began recognizing the control speakers asserted when introducing topics, the frequency in which speakers enter conversations, the common occurrence of interruptions or overlaps, and the length of time speakers held the floor.<sup>206</sup> All of these characteristics within dialogues became means by which analysts could evaluate conversations and begin determining how speakers controlled conversations or prevented other speakers from entering dialogues or interrupting topics of conversation.<sup>207</sup> Identifying and capturing these phenomena enabled discourse analysts to capture speakers’ interactions in dialogue and demonstrate where inequalities may exist due to the discursive interaction between participants. By identifying inequalities and capturing the frequency by which inequalities occur discourse analysts are poised to

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<sup>205</sup> Shoshana Blum-Kulka, “Discourse Pragmatics” *Discourse as Social Interaction* vol 2. Ed. Teun A. van Dijk. (London: Sage, 1997): 42.

<sup>206</sup> See Harvey Sacks, Emanuel A. Schegloff, and Gail Jefferson, “A simplest systematic for the organization of turn-taking for conversation. *Language* 50.4 (696-735) 1974. ; Emanuel Schegloff, “Sequencing in Conversational Openings” *The American Anthropologist* 70.6 (1075-1095) 1968.; Emanuel Schegloff, “Identification and recognition in telephone conversation openings” Ed. George Psathas, *Everyday Language Studies* (New York: Irvington, 1979).

<sup>207</sup> See Norma Murkee, *Conversation Analysis* (New Jersey: Lawrence Erlbaum, 2000) for an example of a number of characteristics integrated into a lengthy study regarding Secondary Language Acquisition.

make significant contributions to areas of study, such as politics or law, in which they seek an improvement in human understanding.

A wide group of methods exists within the field of discourse studies, and discourse analysis is often adopted by a wide variety of fields, but where discourse analysis departs from sociology or conversation analysis, is in its concern for improvement of human communication and a balancing of political inequalities. Discourse analysis seeks to make a change where other disciplines and fields of study desire to accurately capture and catalog typologies of interaction.<sup>208</sup> Because discourse analysis looks to improve human communication and offers a unique set of methods to capture the phenomena of rhetorical discursive interaction, it seems a valuable critical approach to understanding and hopefully improving communication in the Supreme Court's oral arguments.

My hope, after reviewing the various critical areas informing this study, is that readers should see the benefit of all three critical areas and how they each serve to strengthen one another. All three critical areas reflect a primary concern for communication's ability to constitute human thought and society. My description of the various critical areas of study drew upon general characteristics. Smaller strains of study within each area may overlap and the delineations between fields are not as clear as I have portrayed them; however, I have described them in a manner which highlights each area's usefulness to this study. Each area has its own strengths as weaknesses, but in

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<sup>208</sup> For more on the discussion of differences see Nelson Phillips, and Cynthia Hardy, *Discourse Analysis: Investigating Processes of Social Construction*. (London: Sage, 2002).; George Psathas, *Conversation Analysis: The study of Talk-in-Interaction*. (London: Sage, 1995); Robin Wooffitt, *Conversational Analysis and Discourse Analysis: A comparative and critical introduction*. (London: Sage, 2005).

combination they present a more encompassing and informing view. Rhetorical criticism, unlike discourse analysis or ethnography, considers persuasion through argument. It typically lacks a systematic consideration of a text through its methods, preferring to focus on past speeches or printed texts, rather than active dialogue.

Discourse analysis lends to rhetorical criticism a systematic approach to studying dialogue, a concern for understanding in communication, and a goal of identifying and resolving problems. However, Discourse analysis lacks a concern for persuasion and the development of arguments. It does not typically consider the persuasiveness of a speaker's strategic deployment of arguments, organization of a dialogue, or adopted delivery style. Ethnography brings a contextual understanding to both critical areas, and first-hand observations attune critics to speakers' personalities as well as their bodily behavior. Ethnography within Sensemaking is concerned about the influence of communication upon a person's cognition and subsequent ability to resolve problems. Where discourse analysis and rhetorical criticism ignore the ability for a speaker's communication to reinforce their own personal commitments, sensemaking highlights the ability for humans to convince themselves of a position through speech.

Sensemaking lacks a concern for persuasion, or arguments, or a systematic approach to examining active communicative interaction, but its cognitive concern informs an important dimension of decision making that rhetorical criticism and discourse analysis does not consider. Oral argument is a highly complex environment where a large number of speakers enter into rhetorical discursive interaction within a very limited timeframe. Oral argument involves persuasion, understanding, cognition,

and eventually plays a role in a final decision. These dynamic areas require not one approach, but an approach from multiple perspectives, rhetorical criticism, discourse analysis, and sensemaking, in order to capture and critique the process by which justices evaluate cases.

### **Paradigm Approaches**

The explanation of judicial sensemaking and the description of critical areas informing the methods of this study distinctly set it apart from prior studies of Supreme Court oral arguments and offers original research and scholarly contribution in the area of Supreme Court studies. Political scientists and psychologists have traditionally conducted quantitative macro longitudinal studies that overlook interactional discourse, language's persuasive nature, or individual judicial behavior. In the past, researchers employed longitudinal methods because they sought generalizable and replicable findings that adhere to scientific norms and that allow researchers to make broad "scientific" generalizations about judicial behavior. Conversely, this study approaches the topic of oral arguments from a distinctly different scholarly perspective. Although not entirely separate from scientific concerns, I approach the study of Supreme Court oral arguments from a rhetorical discursive or interpretivist's position, focusing more closely on the study of the justices' and advocates' situational and individual behavior through both quantitative and qualitative research. My methods and approaches in this study will more closely reflect the contributions from members of the legal community, which rely on the personal observations of lawyers, judges, and justices, than from contributions by political scientists and psychologists. The disparity in method and

scholarly approach can be explained by fundamental differences regarding theory and subsequent ontological and epistemological assumptions about the world and society.

The famous metaphor of six blind men touching an elephant and describing distinctly separate qualities of the elephant holds true even in the realm of scholarly endeavors, where theoretical perspectives often influence how researchers conduct studies. Scholars rely on theories to understand, interpret, explain, and predict the world around us, and while important to research, theories may also prevent us from fully recognizing other potential explanations. Thus a macro longitudinal study about the Court's oral arguments can tell us about the aggregate behavior of nine justices, but can tell us little about a justice's individual behavior, or how justices may react to various arguments. Conversely, a micro situational study can capture the unique behavior of a single justice within a specific case, but cannot reveal generalizable information about justices' overall behavior across oral arguments. Each theoretical approach has strengths and weaknesses in the insights developed from its position; however, the majority of scholarship on the Supreme Court has ignored certain theoretical positions, and this study seeks to fill that gap.

Prior studies conducted by political scientists and psychologists have assumed a positivist or post-positivist approach to research which looks to establish a universal understanding of the world through objective observations that seek to contribute to the larger foundation of knowledge. Researchers incorporating this post/positivist theory stand at a distance from their object of study and look to identify patterns of behavior which reveal knowledge about the world. Capturing a pattern of behavior allows

researchers to predict behavior in advance, thus explaining why some academic scholars seek to “predict” votes in oral argument. A prediction of the Court’s vote verifies the accuracy of the scholar’s findings. While no real practical advice may be gained by the scholar’s endeavor, the post/positivist is concerned with establishing knowledge that contributes to the larger corpus of knowledge. In contrast to the post/positivist tradition, interpretivists believe objective knowledge proves impossible to obtain because knowledge is unique and situational, which forces researchers to immerse themselves into a context to understand more accurately the environment under scrutiny. Where post/positivists seek generalizability, interpretivists prize transferability in their findings, looking to discover connections among other areas of knowledge. This study takes an interpretivist’s stance to studying oral arguments before the Supreme Court, because every case is different and causes unique responses in each of the nine justices. To understand the process of oral arguments it is important to observe the act as much as possible and to obtain audio and typed transcripts of every argument under evaluation. In addition, because I have not, nor ever will, personally argue a case before the Supreme Court, it is important to speak with advocates who have argued before the Court to learn about their experiences. Finally, and not directly oppositional to post/positivists, I have sought to ensure that my findings make a practical contribution to the legal field.

### **Research Methods**

The following study examines oral argument at the micro level by studying the rhetorical discursive interactions between justices and lawyers to better understand how

judicial interaction influences information gathering and argument development. In order to evaluate judicial interaction within oral arguments, I analyzed the oral arguments in *Morse v. Frederick*, *Kennedy v. Louisiana*, and *District of Columbia v. Heller* by posing the following questions to consider judicial communication in a variety of areas:

1. Do justices demonstrate a substantial preference for one counsel over another in
  - a. their challenging of counsels,
  - b. their permitting counsels an equal opportunity to respond,
  - c. their frequency at which they interrupt counsels,
  - d. their assistance of counsels arguments, and
  - e. their treatment of counsels?

In responding to these questions, my analysis is heavily influenced by my observations of oral argument before the Supreme Court. My firsthand observation of nearly fifty oral arguments, interviews with top advocates who regularly argue before the Court, and a discussion about oral argument with Associate Justice Stephen Breyer largely inform my analysis. Witnessing oral argument and learning about the physical behavior and rhetorical discursive interaction of justices provided a level of understanding which more fully informed my reading of transcripts and development of methods. My experience at the Court forced me to consider quantitative and qualitative approaches that could capture the dynamic interactions occurring within oral argument. Learning, first hand, about the justices' rhetorical interaction, physical behavior, and unique personalities, helped me recognize the impact justices' questions had on other justices. Observation of



physical behavior and rhetorical discursive interaction at the Court revealed the displeasure justices display when their line of questioning has been interrupted or when they are unable to ask a question due to more active justices. At times, justices would lean forward to ask a question, and before uttering their remark, another justice would speak first and shift the course of inquiry. Justice Scalia's persistent questioning often redirected lines of questioning that other justices were pursuing, and his frequent comments regularly prevented other justices from asking questions. Justices grew irritated by the rhetorical interaction of other justices, and I could not help but wonder how many justices still held questions they wanted to ask, or how many questions were never answered because of another justice's interruption. Chief Justice Roberts strictly enforces the time limit for oral argument which often results in some justices being unable to ask questions. Chief Justice Roberts would occasionally terminate an oral argument as another justice was leaning forward to ask a question. In another incident, Chief Justice Roberts interrupted Justice Breyer, as Justice Breyer interrupted an advocate's response to Justice Alito, and called for Justice Breyer to allow the advocate to respond to Justice Alito's question. Finally, absent from transcripts and only available from first hand observation is the justices' tendency to occasionally perform for the audience, using humor to generate laughter and break up the tedium of arguments, or use hand gestures to dismiss arguments. Justice Breyer tends to be very animated in arguments that pique his interest, and will throw up his hands, shake his head, or nod in approval. Justice Scalia also remains active as he rocks back and forth in his chair nodding approval or shrugging his shoulders. A significant dimension of understanding

about the process of oral arguments would be lost without the experience of witnessing the justices' rhetorical discursive interaction first hand.

In conjunction with ethnographic research, I obtained oral argument transcripts from the Supreme Court website, and listened to oral arguments on Oyez.org in those cases in which I was not present.<sup>209</sup> Listening to oral arguments helped me gain a better understanding of justices' intentions behind a statement or question. Recognizing supporting or challenging statements often depended upon the tone of justices; sarcasm and humor were not uncommon and gave a very different meaning to a statement than what the written record showed. My analysis of rhetorical discursive interactions within arguments drew heavily upon the concepts discussed earlier that are related to Austin, Searle, and Schegloff's contributions to discourse analysis. I have revised versions of speech act theory and Schegloff's developments in conversation analysis to better align with the formalized and challenging environment of oral arguments.

In analyzing arguments, I collected the number of instances in which justices interrupted lawyers based upon the actual transcript as well as listening to the argument. Argument transcripts only record mid sentence interruptions, but audio files enabled me to discern interruptions not captured in the transcript. While interruptions can reveal a more challenging rhetorical environment, understanding how frequently justices challenged, assisted, or neutrally questioned counsels is also important in understanding rhetorical discursive bias.<sup>210</sup> To determine whether justices equally challenged counsels,

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<sup>209</sup>www.Oyez.org. I would like to thank the Oyez project for their help in my research.

<sup>210</sup> My use of the term "bias" may prompt readers to believe that I am suggesting an overt preference for one counsel versus another. While the justices may in fact hold a distinct bias when approaching oral

I divided justices' statements or questions between those they made during the petitioner's and respondent's oral argument, and then categorized statements or questions based upon whether they challenged or supported the advocate's argument, or neutrally impacted the argument. I also listened to the tone of their voice for any sense of hostility or sarcasm that might shift the literal reading of the transcript. I deemed challenging statements/questions those which questioned the argument or proposed a hypothetical which tested the counsel's argument (e.g. "That doesn't make any sense to me. Does it depend on his intent, whether or not he intended to be truant that afternoon?").<sup>211</sup> I considered assisting statements/questions to be helpful to the lawyer in framing or emphasizing aspects of the argument (e.g. Scalia: "This banner was interpreted as meaning smoke pot, no?" Starr: "It was interpreted exactly, yes").<sup>212</sup> I recorded neutral statements/questions as those statements by justices asking for small matters of fact, or references in the brief (e.g. "Can I ask you another record point, just so I know where to look").<sup>213</sup> By achieving a more nuanced understanding of justices' statements, we can better recognize rhetorical discursive bias in judicial interaction. Finally, in order to determine equal speaking times, I timed speaking moments for all participants in oral argument. I did not include moments in which a justice or lawyer was forced to repeat a statement or question. Quantitative recordings provide an

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arguments, my interest lies in studying how their rhetorical discursive interaction in oral arguments may influence the flow of information and arguments, as well as how discourse impacts a justice's ability to evaluate a case.

<sup>211</sup> *Morse v. Frederick* (55:16-18)

<sup>212</sup> *Morse v. Frederick* (8:14-18)).

<sup>213</sup> *Morse v. Frederick* (46:7-9)).

efficient means of capturing iterations providing readers with a list of assisting or challenging statements made by the justices. Qualitative analysis compliments quantitative findings by providing a more transparent examination of the justices' treatment of counsels.

Using a more qualitative approach to understand whether justices showed preference for one counsel over another, I compared whether or not justices assisted counselors equally, by providing them with frames or arguments that strengthened their position. I also compared whether justices equally ridiculed or denigrated counselors to determine if justices treated counselors preferentially. This qualitative approach enables me to provide poignant examples to readers that capture justices' rhetorical discursive bias and treatment of lawyers in their own words. While quantitative analysis reveals the frequency at which justices interact, qualitative analysis allows readers to judge for themselves whether arguments fulfill the categories I have created.

## **Conclusion**

This chapter has covered wide ground in the theoretical exposition of judicial sensemaking, a discussion of its potential dangers in judicial decision making, critical areas of communication studies relevant to studying sensemaking in oral argument, and an articulation of the study's adopted methods. In oral argument and as a result of rhetorical discursive interaction, judicial sensemaking presents a host of obvious problems that could impact justices who are active in their communicative interactions, as well as less active justices desiring to ask questions or resolve misunderstandings about the case. To analyze and examine sensemaking behavior, this study requires

methods concerned with persuasion, understanding, and contextually situated communication. Rhetorical criticism, discourse analysis, and ethnographic study all provide approaches that reveal the inherent complexities of oral argument. These three areas work in concert to focus on areas one specific approach might overlook and provide the most comprehensive picture of the justices' rhetorical discursive interaction in oral arguments.

This study's methods and primary research questions seek to identify sensemaking behavior, but the study does not attempt to explain why justices act as sensemakers. Why justices display sensemaking behavior is less important than identifying how sensemaking behavior in oral argument may influence both sensemaking and non-sensemaking justices' understanding of the case. To explain or identify why justices behave as sensemakers would be a goal more closely related to a psychological study, whereas this study emphasizes communication's impact within the environment of oral argument, and theorizes how justices' understanding of a case may have been influenced. We can never definitively be sure how oral arguments may have influenced a justice's perspective, either in generation or reflection of ideas. While underlying motivations are interesting, they are not the primary concern of communication scholars. Communication scholars more generally concern themselves with understanding the role of communication between humans. In this study, I am interested in understanding the role of communication within oral arguments and how sensemaking behavior may influence the justices' understanding of a case.

The overriding goal of this study is not to wholly establish sensemaking as a model of decision making, but rather to present scholars with enough evidence to consider its usefulness in explaining judicial behavior, and at the very least, that scholars begin to realize the importance of rhetorical discursive interaction within oral arguments. The following chapters begin to make the case for the applicability of sensemaking in oral arguments. The next chapter explains the context of oral argument by describing each justice's personal rhetorical discursive style for readers to reach an understanding of each justice's interactional style. Chapter IV concludes with a comparison between the strategic actor model and sensemaking in an analysis of rhetorical discursive interaction from *Morse v. Frederick*. The analysis identifies sensemaking and strategic decision making behavior, giving initial support to the use of sensemaking in the analysis of oral arguments.

## CHAPTER IV

### ORAL ARGUMENTS MATTER BECAUSE . . .

#### PRELIMINARY REVELATIONS OF METHOD AND THEORY

The prior chapter proposed theoretical expectations and drawbacks associated with judicial sensemaking, and articulated unique methodological approaches that may assist uncovering answers to the question “Oral arguments matter, but how?” This chapter offers preliminary analysis of the Supreme Court’s rhetorical discursive behavior in oral arguments by providing a description of the variety of purposes informing oral argument, a summary of the justices’ individual rhetorical style, and an examination of oral arguments from *Morse v. Frederick*, thus establishing the effectiveness of methodological approaches and the validity of Sensemaking as an alternative model to understanding rhetorical discursive interaction in oral arguments. A description of the complexities surrounding the Court’s communicative interaction will enable readers to understand the context of oral arguments’ challenging environment and the multiplicity of purposes that contribute to the significance of oral argument. As previously discussed, scholars have sought to establish singular or limited purposes for oral argument without fully recognizing its dynamism. My description of oral arguments builds upon prior concepts, and foregrounds additional significant dimensions surrounding oral argument. After a description of the Court’s rhetorical discursive style, an articulation of each justice’s individual communicative style will provide readers and

scholars with an understanding of each justice's unique approach to oral argument.<sup>214</sup>

Finally, the chapter concludes with an analysis of oral arguments from *Morse v.*

*Frederick*, the famous “Bong Hits 4 Jesus” case, which reveals weaknesses surrounding the strategic actor model and foregrounds the strengths associated with implementing Sensemaking as a model for understanding the significance of oral arguments. The analysis of *Morse v. Frederick* provides initial validity for both the methodological and theoretical approaches used in the study's subsequent cases.

### **The Court's Rhetorical Discursive Interaction**

As noted previously, Justice Kennedy has characterized oral argument as a place where the Court has a dialogue with itself and his metaphor briefly foregrounds the dynamic interplay involved. In dialogues, speakers and audiences may have differing purposes; some speakers may want to understand, others may want to persuade, and others may want to listen. Observers may see speakers' communication as a process of investigation, argumentation, or indifference. Because oral argument, as a site of communication, involves a wide spectrum of people, ranging from justices and advocates to lay audience members, oral argument has a variety of functions and purposes, often overlapping simultaneously. The multiple functions of oral argument derive from the unique communicative style each justice applies to oral argument, and the separate meanings oral argument may hold for advocates and observers. The differing perspectives of audience members, advocates, and justices create a complex

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<sup>214</sup> While a taxonomy of the Court's oral argument may seem mundane and uninteresting, strangely, scholars have ignored describing individual justices' rhetorical discursive styles, and the following descriptive section attempts to fill the scholarly gap.



communicative interplay. Previously Dickens and Schwartz listed eight functions for oral argument, but the following research provides a more comprehensive list of over twenty functions for oral argument, most importantly including the addition of sensemaking.

### *Country and Citizenry*

On the broadest and most general level oral arguments plays an important role for our country and its citizenry. (1. The Court's arguments validate and carry out the constitutional function of the Court's ability to review and hear cases. While the Court's "legitimacy is in the Constitution," their "power rests on public faith in their independence and impartiality."<sup>215</sup> (2. As a communicative act the Court's arguments symbolize the pinnacle of law where the greatest minds struggle with some of the nation's most pressing and difficult issues surrounding the interpretation of the Constitution. It is remarkable that a 200 hundred year old document continues to control the nation's governance, but how Americans should interpret the Constitution can be a divisive topic in oral arguments. Justice Scalia does not believe "the Constitution has become any more clear or means anything different from what it originally meant."<sup>216</sup> Yet Justice Kennedy sees clarity surrounding the Constitution as a result of "two hundred years of history of detachment in which we can see the folly of some ideas, the

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<sup>215</sup> Narrator, "The Supreme Court of the United States" York Associates Television, nd.

<sup>216</sup> Antonin Scalia, "Supreme Court Interviews" *Lawprose.org* (2006): accessed 10/1/2008.

wisdom of others.”<sup>217</sup> Justice Ginsburg recognizes the Constitution as an evolving document:

We don't have the Constitution that was written in 1787 or even 1791 when the Bill of Rights was added. We have the post Civil War Amendments, we have the 19<sup>th</sup> amendment. Remember that “we the people” was composed of a very small part of the people in fact inhabiting these shores, no women could vote, people were held in bondage, native americans were not treated as citizens of equal stature and dignity, so those people do count among “we the people” our Constitution embraces today, although it didn't at the start.

The justices' diverse positions regarding the Constitution often results in divisive arguments based upon their interpretive perspective. (3. Highly symbolic, but equally practical in nature, the Court's arguments serve as a place to resolve mundane matters that have divided the lower courts, serving a vital function to reach agreement over dividing legal principles, and “giving guidance” to lower courts in “other cases.”<sup>218</sup> Justices and advocates often debate the future effects of the Court's potential decision, or use oral argument as a time to resolve ambiguous rulings that have resulted in problems for lower courts. In regards to government matters, the Court also is “repeatedly called upon to draw the boundaries of government power, telling the president Congress, and the States, what they may or may not do.”<sup>219</sup> The Court's practical tasks and symbolic nature in oral argument foster a complex environment where the public may view the justices at work.

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<sup>217</sup> Anthony Kennedy, “Supreme Court Interviews” *Lawprose.org* (2006): accessed 10/1/2008.

<sup>218</sup> Anthony Kennedy, “Supreme Court Interviews” *Lawprose.org* (2006): accessed 10/1/2008.

<sup>219</sup> Narrator, “The Supreme Court of the United States” York Associates Television, nd.

The public's presence in oral argument should not be understated. (4. The public's observation provides a view of our government's legal process at the elite level where for "an hour of high drama where nine of the nation's highest officials do their work in public."<sup>220</sup> The Court regularly reserves seats for the public, varying between 20 and 100 seats, depending upon the popularity of a case. Lawyers, homeless people, protesters, and students all stand in line together, sometimes standing in line for days waiting to gain entrance to high profile arguments. In *Heller v. D.C.*, lines for oral argument began three days in advance. The Court actively discourages law clerks from holding spots for lawyers, encouraging an egalitarian environment, and fostering an inviting atmosphere where all people are welcome to bear witness to the Court's proceedings.

First timers to the Court are regularly awed by the process and the close proximity they sit to the justices. Many observers remark that the Courtroom feels like a church. Images of the Ten Commandments, Moses, Muhammad, and Angels only compound religious connections. Unfortunately, the Court's oral arguments are not always entertaining and disputes of codes and statutes can create a tedious technical argument that baffles most people in the courtroom. It is not unusual for visitors to fall asleep and even the justices succumb to drowsiness occasionally. While the justices may doze lightly, police officers prevent anyone else in the audience from sleeping, occasionally scaring nodding high school students as they sternly whisper for them to stay awake. (5. Finally, and perhaps most importantly, the public expects the Court to

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<sup>220</sup> Narrator, "The Supreme Court of the United States" York Associates Television, nd.

seek Justice when resolving disputes. “Equal Justice Under Law” stands emblazoned over the Court’s primary entrance, and as both an ideal symbol and practical entity the American people expect justice from the Supreme Court. Americans view the Court as an “institution, [with] a willingness to protect the unpopular, to stand against the temporary political tide, a concern for principles beyond today’s politics.”<sup>221</sup> Statues of blind justice abound in the Court and even the title of “Justice XYZ” suggests the justices intended purpose. It may seem idealistic for citizens to expect objectivity and impartiality from humans charged with delivering justice, but it is an important driving ideal that justices should strive for and hold. (6. I believe the justices desire Justice in every outcome, but also recognize the practical nature of their task. Justice Souter has noted:

most people are willing to accept the fact that the Court tries to play it straight. That acceptance has been built up by the proceeding hundred justices of this Court going back to the beginning. We are in fact trading on the good faith and the conscientiousness of the justices who went before us. The power of the Court is the power of trust earned, the trust of the American people.<sup>222</sup>

#### *Lawyers and Clients*

(7. Arguing a case before the Supreme Court is a rare opportunity for most lawyers and provides them an opportunity to bring their client’s claims to the highest court in the land. Justice Thomas reflects that “the wonderful thing about oral argument is that people get to come to a final institution in our system and say their peace.”<sup>223</sup> (8.

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<sup>221</sup> Narrator, “The Supreme Court of the United States” York Associates Television, nd.

<sup>222</sup> David Souter, “The Supreme Court of the United States” York Associates Television, nd.

<sup>223</sup> Clarence Thomas, “Supreme Court Interviews” *Lawprose.org* (2006): accessed 10/1/2008.

Both a revered ritual of the legal academy as well as a part of the legal process, lawyers primarily use oral arguments to address the key issue upon which their case turns.

Identifying the essence of a case creates the opportunity for lawyers to communicate the importance of an issue that justices may have overlooked in the briefs. Oral argument saves the justices time by enabling them to “obtain the essence of the case . . . and to be able more quickly to separate the wheat from the chaff.”<sup>224</sup> At a minimum, justices are responsible for about 500 pages of documents, often upwards of 2,000 in major cases (briefs from both sides, lower court rulings, transcripts, fact findings, as well as *amicus curiae*). Oral argument provides lawyers with the moment to crystallize the appeal by clearly and concisely extracting the essence of a case and persuading the justices why they should rule in his or her favor. Cutting through the briefs to the heart of a case in a clear manner is an essential skill which can reduce the complexity of a case, and can assist justices in finding a path to resolve a case. Although this task seems straightforward, very few lawyers can articulate the essence of their case amidst the chaos of the justices’ questioning.

Experienced advocates typically handle the justices’ questioning with greater skill, and their oratorical delivery provides a level of confidence which manages the justices’ questioning. Justices will treat inexperienced lawyers more gingerly than experienced lawyers by beginning with a slow rate of questioning. If inexperienced advocates are well prepared and capable of maneuvering the intellectual gauntlet, then the justices tend to treat them respectfully; however, if neophytes are unprepared for the

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<sup>224</sup> Charles Evans Hughes, *The Supreme Court of the United States* 61-62 (1928).

variety of the justices' questions, then they may suffer an abusive onslaught that an experienced advocate could gracefully skirt past. For lawyers, oral argument before the Supreme Court is like the Super Bowl and few lawyers are willing to turn their case over to a more experienced advocate. This is a prideful mistake that does substantial injustice to clients. Experienced advocates bring a refined skill and level of knowledge that can only be gained by a near obsessive dedication to the art of oral argument.

Lawyers should consider that most elite Supreme Court advocates, who have argued over 25 cases, such as David Frederick, Ted Olson, Seth Waxman, Carter Phillips, Tom Goldstein, Maureen Mahoney, and Miguel Estrada, spend a minimum of 80 hours on a case and at most 200 hours for the most complex cases. These top advocates typically argue a minimum of three to five moot courts before they make their final argument before the Court. Aside from the lack of time and attention to devote to their client's case, most inexperienced lawyers face a greater task than simply 100 hours of preparation, because they must practice extensively to bolster their rhetorical skills to attain the mental acuity and oratorical delivery the Court requires of them, unfortunately this task is truly only honed through a significant number of arguments before the Court. Even good lawyers, who have argued a few times before the Court, will lack the dynamic behavior of experienced advocates that can maintain the Court's attention and truly advance their client's case. Novice lawyers also make the mistake of surrounding their arguments with legal jargon which may prove confusing to some of the justices unfamiliar with the specialized language of certain legal areas (e.g. tax, patent, technology, or certain statutes). While the justices each have their particular specialized

legal background, skilled advocates will present their arguments in a manner that even lay people can understand. A clear presentation enables all justices to achieve an understanding, and can create a real advantage when an advocate's opponent cannot break from their confusing jargon.

(8. Advocates may also use oral arguments to provide the justices with new information that has developed in a case, or information they could not include in the briefs because of brevity requirements. (9. In supplying the justices with new information, advocates may also alleviate a justice's confusion about information or facts in a case. Oral arguments are almost as if the justices invite counsel into a conference where advocates may "serve as a resource providing information needed to clarify the thinking of justices, and to bring an organizing theme, emphasis, and note of drama to marshal the information in a meaningful way."<sup>225</sup> (10. Advocates may also be able to persuade justices to vote with them, by either changing a justice's mind, a tall order and rare occurrence, or by reinforcing a justice's predilection in the case. (11. But at times even new information, clarification, or persuasive articulation of a case may not persuade all the justices, and advocates must consider how they should lose a case. While this may sound strange, the manner in which an advocate loses a case can have significant repercussions for the country. Cases may be lost on minor points, which may change very little in the legal landscape, or they may be lost in significant ways that could drastically alter society. Advocates want to be remembered for their great victories, and not significant defeats. However, advocates must "grapple with the

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<sup>225</sup> Stephen M. Shapiro, "Questions, Answers, and Prepared Remarks." 15 *Litigation* 33, 34 (Spring 1989).

difficult legal issues presented by the case” and remain focused, win or lose, on how the case’s resolution “will affect the development of the law.”<sup>226</sup> Because lawyers never address the issue of a possible loss in their briefs, oral argument provides advocates, when asked by justices, with an opportunity to articulate how justices might decide against them with a modest change to the legal landscape. Advocates should be prepared for this uncomfortable moment, because even in strong cases, justices may push for alternative means of resolution. Although often overlooked, oral argument is the site where advocates must be prepared to explain a manner in which justices may rule against them, yet do the least amount of damage to their case.

(12. Although losing a case may not seem an opportunity to persuade a justice, because it does not change their vote against a lawyer, it does provide a lawyer with the chance to persuade a justice of a certain course of legal reasoning in their opinion. Rex Lee has suggested that a “good oral argument” may be more likely to “result in a better opinion than in a changed vote.”<sup>227</sup> The Court’s opinion obviously can have great significance upon the social fabric of our country, and lawyers should not avoid considering how to lose advantageously. (13. In contrast to losing a case but winning an advantageous opinion, lawyers will often have justices present them with an opportunity to persuade them of their position. In these instances, justices will pinpoint their disagreement with lawyers and then ask why they are incorrect in their position. Justice

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<sup>226</sup> Catherine Valerio Barrad, “Successful Oral Arguments Do Not Involve Any Arguing,” *San Francisco Daily Journal* 8/4/2004, p. 5.

<sup>227</sup> Rex Lee, “Oral Argument in the Supreme Court,” *American Bar Association Journal* 72 p.60 (June 1986).



Scalia “give[s] counsel his or her best shot” to persuade him by stating “ ‘Here’s what’s preventing me from going along with you. If you can explain why that’s wrong, you have me.’”<sup>228</sup> When justices present advocates with the chance to persuade them, this can be a genuine opportunity for the advocate to shift a justices’ position, but it can also be an articulation of a justices’ intractable position that the advocate would be wise to simply move past. Justice Breyer regularly explains his problem with a case, allowing counsel an opportunity to persuade him differently. On the other hand, Justice Scalia, in contrast to his prior claim, will explain his disagreement with an advocate, only to consistently dismiss the lawyer’s arguments and waste valuable argument time. Some scholars believe that justices enter oral arguments with their minds already made up, and while this is true to a degree, justices will regularly change how they understand a case, in turn shaping how the opinion develops, and the law that shapes our country. Justice Stevens has remarked that he has changed his mind “after argument, after conference, and after I’ve started writing the opinion.”<sup>229</sup> Advocates should not overlook the ability to change a justice’s mind because “you cannot assume that your case will not be one of them.”<sup>230</sup>

### *Justices*

Already thirteen functions of oral argument have been listed, yet the justices add even more of a multivariate purpose to oral argument, particularly because their behavior

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<sup>228</sup> Joseph W. Hatchett and Robert J. Tefler III, “The Importance of Appellate Oral Argument,” *Stetson Law Review* 33 P. 142 (2003).

<sup>229</sup> John Paul Stevens, “Supreme Court Interviews” *Lawprose.org* (2006): accessed 10/1/2008.

<sup>230</sup> Rex Lee, “Oral Argument in the Supreme Court,” *American Bar Association Journal* 72 p.60 (June 1986).

and purpose can change so dramatically in cases. (14. At the most mundane level, oral arguments legitimize the purpose of the Court, giving validity to the justices' position and their authority to resolve legal disputes at the highest level. (15. Justices may also use oral argument as a time to clarify information. (16. And they may also try to gather more information about a case. There is an "exchange of information among the justices" and advocates.<sup>231</sup> (17. Often the clarification of information and gathering of new information helps the justices to create a coherent narrative or understanding of events in a case. Justices are charged with the unenviable task of discerning a clear understanding of events, or narrative, from two competing advocates. Neither advocate wants their portrayal of events to hurt their case, so both advance a set of events which may eschew and emphasize certain happenings. These competing narratives leave the justices in a position where they must discern for themselves a coherent frame of events upon which they can base their legal ruling. Oral argument is the first site in which justices must hash out the particulars of competing narratives, and advocates who are unable to present a clear picture of events will often leave the justices confused, and at the mercy of an advocate who can provide a more clear understanding. In fact, the explanation of the Court's written opinion often begins with a narrative that emphasizes certain events in order to support the Court's decision. Dissenting opinions will portray a series of events which opposes the majority's decision and clearly supports the dissenter's perspectives.

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<sup>231</sup> Justice Scalia in Joseph W. Hatchett and Robert J. Tefler III, "The Importance of Appellate Oral Argument," *Stetson Law Review* 33 P. 142 (2003).

(18. As justices negotiate narrative complexities, they also begin to tentatively advance their personal arguments, or conversely their opposition to or dismissal of an argument. These tests help the justice understand the limits of a lawyer's argument and further conceptualize the potential ramifications involved in ruling in favor of a lawyer. The Court's justices "want to know how the principle of law works out in other situations," because they care about "the legal issue that is going to decide not just this case, but hundreds of other cases."<sup>232</sup> Novice advocates are often caught off-guard by the justices attempt to expand a lawyer's legal argument past the case at hand and into potential future legal scenarios. If an advocate is incapable of addressing, or has not considered, the far reaching consequences of his or her argument, then he or she will likely lose the case. Because, while the novice advocate cannot satisfy the justices' inquiries, a more skilled opponent will likely articulate the benefits of their own position as well as the damaging consequences of their opponent. Advocates will also suffer from the comments of an opposing justice who will reduce their argument *ad absurdum*.

(19. As justices test their support or opposition to an argument and legal theory, they most commonly employ a hypothetical situation. Unfortunately, hypotheticals prove to be a site of great confusion because justices and advocates often use the same words for different meanings, resulting in cross talk and wasting valuable time as justices try to clarify their hypo and advocates attempt to provide a satisfactory answer to a muddled hypo. Justices place great importance upon hypotheticals and advocates would be wise to address or bypass hypotheticals without referring to the trite line "that is not this

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<sup>232</sup> Antonin Scalia, "Supreme Court Interviews" *Lawprose.org* (2006): accessed 10/1/2008.

case.” Justice Scalia, “if [he] had to grade advocates” “would really [give] a C for saying ‘this is not this case.’”<sup>233</sup> When advocates state this line, they are often met with the justices’ angry glares or eye-rolling exasperation.

(20. Hypotheticals can create strange intellectual explorations of issues that may not be personally intriguing to a justice, but have no real bearing in a case. Justice Stevens will often ask advocates about their arguments’ relationship to various international laws. If Justice Scalia does not call the argument back to a more focused examination of an issue before the advocate can respond, then exploratory questions can result in an uncomfortable moment for the inexperienced or underprepared advocate. Off topic explorations can also eliminate valuable time for more productive arguments. Tentatively exploring a position can also be significant in both the understanding for justices, but also in the Court’s development of voting blocs. (21. While testing arguments with advocates to resolve their own questions, justices are also revealing to the rest of the Court their potential voting positions. It may seem strange that justices are learning for the first time the voting positions of their colleagues, but generally justices do not discuss the case or tentative voting positions before oral argument. So oral argument serves as a crucial moment in which justices begin to reveal where they stand in a case. Justice Stevens uses oral argument to make the other justices aware of certain points. He describes the process as “hav[ing] a point in mind that you think may not have been brought out in the briefs well, but you want to be sure your colleagues don’t overlook it. . . . You’re not necessarily trying to sell everybody on this position but

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<sup>233</sup> Antonin Scalia, “Supreme Court Interviews” *Lawprose.org* (2006): accessed 10/1/2008.

you want everyone to at least have the point in mind.”<sup>234</sup> Sharing arguments and perspectives can be a valuable moment for justices in which they may be convinced that a counsel’s argument “was either right or wrong, and during the course of the case a point made by me or by one of my colleagues has completely changed one’s view.”<sup>235</sup>

(22. Learning each other’s arguments and tentative positions creates a unique situation because justices begin to jockey for the primacy of certain arguments, forming alliances with other justices, or trying to vigorously convince other justices to vote with them.

(23. This strategy may result in a group of justices stridently attacking an advocate in order to discredit an argument and win a fifth vote for their alliance. In this instance, oral argument becomes a very hostile environment in which consideration of issues and an advocate’s argument is less important than discrediting an advocate’s argument to win a fifth vote. Unfortunately, this tactic appears more frequently in highly political and significant societal cases where citizens would hope for more careful consideration instead of strategic attacks.

(24. Although testing theories and revealing tentative voting positions is common, justices may also enter arguments with a clear voting position and use arguments to articulate how they believe the Court should rule in this case. In this instance, justices are trying to persuade each other of how they should rule in a case, and the opinions they should adopt. This rhetorical situation often results in Justice Kennedy’s analogy of a dialogue. The justices will use the advocates as sounding boxes,

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<sup>234</sup> John Paul Stevens, “The Supreme Court of the United States” York Associates Television, nd.

<sup>235</sup> Lord Guest quoted in Alan Paterson *The Law Lords* p. 37 (1982).

in which they articulate various positions, stating “Don’t you mean to argue XYZ,” or “Isn’t a better argument ABC.” These situations can prove entertaining to the audience because the advocate simply serves as a conduit for justices to argue between themselves. Advocates may agree with a justice’s advantageous argument, and after agreeing with the justice they will be met with a challenging hypothetical from an antagonistic justice. The antagonistic justice will often be answered, not by the advocate, but by a justice who favors the advocate’s position. Justice Breyer and Justice Scalia regularly spar through the advocates, creating a humorous situation, because the advocates are often befuddled as to how they should respond, as well as whether they should interrupt the argument of the two justices to advance their own position. The argument for a position can often get heated as justices vigorously attempt to convince other justices to join with their opinion. If a few justices are each advancing their own opinion of how they ought to rule in a case, it may result in a fragmented argument in which an argument’s persuasiveness is diluted by other justices advancing their own views. As justices advance particular arguments, they also will resist and identify potential obstacles the Court should be aware of if they want to gain their support. (25. This behavior begins another unusual process of public debate in which justices begin trying to persuade that justice of how to bypass the personal obstacle or suggest other potential theories which may satisfy that justice.

These internal arguments between the Court, as well as an advocate’s ability to persuade justices of particular points should not be overlooked. (26. In oral arguments, the greatest function is perhaps the ability for a well articulated argument to shape a

justice's written opinion. It is unusual for justices to fully change their voting position from when first entering a case's oral arguments, but it is common for justices to have a different understanding in how they may write the opinion to justify their decision. Justices will commonly concede to a different view of an argument than what they previously entered, and Justice Breyer often will admit in oral arguments that he now sees the case differently because of an advocate's arguments. The oral arguments provide advocates with the opportunity to discuss a variety of possibilities justices may rule in their favor. (27. Justices enjoy strategizing about how they might craft an opinion in oral argument, because it begins the practical nature of addressing a problem with the philosophical nature of employing legal ideals. If advocates can provide justices with a variety of options for resolving the current issue before the Court, then justices will begin to isolate one particular argument that suits a group of them. Strategizing the resolution of a case helps the justices explore the political, cultural, and Constitutional repercussions of their potential decision, helping lead them to an advocate's desired outcome.

(28. Finally, and most important to the function of oral arguments is the physical act of communication and its influence upon cognition. Through the explanation of Weick's Sensemaking, I have already detailed at length the important connection between speech and cognition. Oral arguments may present a site where justices, both aware and unaware, may use language and communication to inhibit their ability to carefully weigh arguments from both sides of a case. Justices may also dominate an argument through over active interaction, preventing advocates from advancing

persuasive or important information that could influence how other justices evaluate a case. Communication's influence on cognition highlights one of the primary reasons justices' interactions should be studied and understood. Oral arguments play a crucial role in a justice's ability to evaluate a case, and for justice to be obtained, advocates should expect fair treatment from all the justices. Conversely, justices should expect their colleagues to engage in balanced questioning to prevent interactions from clouding judgments.

Although Justice Kennedy's comparison of oral argument as a dialogue provided a rich metaphor to unpack, the Court's oral argument more closely mirrors the dynamic nature and complex process of a discussion at a large family dinner. Discussing a controversial topic at the dinner table can foster a variety of responses and blocs of members will form in their opinion of topics. Those managing the discussion must try to discern the motivation of family members as well as respond to various communicative idiosyncrasies particular to each member. A site of significant interruptions, where members interpret stories and ask questions whenever they would like, discussions at family dinners may become fragmented and disjointed, lacking cohesive organization. Humor also plays a role in family dinners, often used as a means of bonding and breaking down social barriers.

Clearly the Court is not a family dinner, but the simile is helpful to grasp the complexity of the justices' purposes as well as the difficulty advocates face in articulating a coherent argument through the justices' various interruptions and challenges. Although the Court is a place where lawyers are expected to show deference



to justices, justices often approach oral argument with less pretension, desiring a more informal and productive discussion. Justices overlook advocates confusing them with other justices, and they use humor to alleviate the tension or kindly call attention to an advocate's mistake. They are also capable of anger and frustration when an advocate advances a poor argument, fails to answer a question, or cannot manage a hypothetical's complexities. In part, this frustration is largely due to an advocate's lack of preparation and his necessary understanding of a case.

The top Supreme Court advocates often make their deliveries as if they are speaking to a large family. Although they are very respectful to the justices, they push back and talk past justices to reach justices who may be more agreeable to their position. One famous advocate told me that when a justice begins to get overly antagonistic and petty, he will stop looking at that particular justice, making eye contact with other justices whom he believes will be open to his arguments. The lawyer will still answer the justice's questions but does so in a manner favorable to his own argument, and his eye contact maintains the attention of the other justices. Another famous advocate will use his hands to hold back justices from asking questions while he is making a point. This particular advocate is very skilled at using his hands to prevent a question for just a few seconds before he turns his attention to the justice he has put on hold. His hands also serve to call attention to another justice on the other side of the bench. If Justice Souter advances a favorable position, this advocate will use a sweeping motion in his response to emphasize how Justice Souter's position aligns with Justice Breyer.<sup>236</sup> Or if

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<sup>236</sup> Justice Breyer and Souter sat on opposite sides of the bench.

the advocate is interrupted by another justice, the same advocate will keep his hand up, pointing to the justice he was responding to as he answers the interrupting justice, in order to signal to the Court that he plans to return to the original question. Another tactic that should not be overlooked is the variant intonation, rhythm, and speed of a skilled lawyer's delivery. Oral arguments can be a tedious process and a monotone advocate will lose the justices' interest; however, an advocate with too rapid a delivery can also hamper their case by creating confusion. Successful lawyers arguing before the Court will use their voice to maintain the justices' attention. As justice Alito begins to nod off, an advocate who requires his vote may turn his direction and raise his voice to catch the justice's attention. All of these particular skills are those common at large family dinners where disagreement, interruptions, and distractions are common.

However, oral argument should not reflect the interactional style of family dinners. Oral argument should be a place where the greatest legal minds discuss the most difficult legal issues in a balanced, fair, and systematic manner. Given the complexities surrounding oral argument, it is the most difficult form of human oratory. No other form of communication compares to its communicative and intellectual complexity. Yet because oral argument is such a complex and tedious process, for both advocates and justices, the communicative act should be treated with a diligent level of care and attention.

Oral argument provides a variety of purposes to both citizens, lawyers, and the justices; most importantly, from the perspective of Communication, the physical act of speech leads to cognition and influences understanding. Rather than reflecting the

traditional model of speech reflecting thought, speech serves to create thought as actors work through their ideas and move towards personally amenable positions. How justices reach these positions can vary and each justice has his or her own rhetorical discursive style which may or may not reflect sensemaking, depending upon their level of interaction; however, justices must be careful about how speech not only influences how others think, but also about how it may impact their own ability to evaluate a case. As this study examines the manner in which justices and lawyers communicate, it seems reasonable to provide a summary of each justice's rhetorical discursive style so readers may grasp an understanding of their typical interactions.

### **The Justices' Individual Rhetorical Discursive Styles**

As a whole, the Court has a unique character that can largely be generalized, but each justice also has their own unique style. The following description of each justice's rhetorical discursive behavior reflects their level of rhetorical discursive activity in arguments. Each justice's participation could vary depending on the case, but generally their interactions fall within a typical rate of engagement. At times Chief Justice Roberts is more active in oral arguments than Justice Scalia, but it often depends on his interest in the case. The press rarely mentions Justice Souter's activity in oral argument, but he is a formidable justice who sets more hypothetical traps than any other justice, causing advocates to regularly walk unwittingly into his traps. Justice Breyer is infamous for his long winded hypotheticals, but they have a knack for striking at the heart of a case and forcing an advocate to answer in a certain directed manner. Justice Ginsburg is fairly active in oral argument, but at times she has difficulty being heard above the other

justices' question. Justice Stevens also suffers from a soft voice as a result of his age, and he often uses oral arguments as a place to philosophize about general legal and humanitarian principles. Justice Kennedy can be somewhat grouchy, but both lawyers and other justices frequently address him when making arguments because he is often the swing justice in many cases. Fairly new to the Court, Justice Alito still appears to be getting comfortable with the process of oral arguments. Justice Thomas is silent, not having spoken in over 200 hours of oral argument. The nine justices are each quirky and unique; it is their individual communicative style which makes oral argument an insightful and at times an entertaining intellectual engagement. The following description moves from the most to least active justice in oral arguments, fittingly we begin with Justice Scalia.

Justice Antonin Scalia is by far the most consistently active justice on the bench. He has developed a famous reputation for being the most talkative as well as the most pugnacious justice on the Court. Justice Scalia enjoys debate, and he equally enjoys dismissing an advocate's argument. His tone and demeanor often reveals his preference for advocates' positions. Justice Scalia will often rescue advocates from other justices' hypotheticals, regularly saving counselors favorable to his position from Justice Souter's hypotheticals. In addition, Justice Scalia commonly helps advocates frame their arguments in a position favorable to the Court. It is not uncommon for Justice Scalia to argue with Justice Breyer through advocates, and while this can foster humorous moments, Justice Scalia's tone can turn nasty and arrogant, resulting in awkward moments for counsels. Likewise, Justice Breyer occasionally grows annoyed when

Justice Scalia's interrupts his hypotheticals. Justice Scalia's interaction is most active in the advocate's arguments with whom he disagrees, and will likely vote against. His behavior in oral arguments makes it very clear which side he supports and will vote in favor of winning the case. Although Justice Scalia's behavior can be disagreeable, he also jokes frequently with advocates, often in a gentle fashion. His humor can displace tension, but his sarcasm can make the courtroom an uncomfortable setting. Justice Scalia's arrogance is apparent in his attitude in the courtroom, but he is not above mistakes, albeit rare, and he is capable of admitting them when he makes them.

Chief Justice John Roberts is the most experienced Supreme Court advocate to have ever recently served on the Court, having argued more than 50 cases before the Court. His experience in oral arguments makes him a formidable justice to face, and he quickly recognizes an advocate's attempt to evade his questions. Chief Justice Roberts' activity in oral argument often rivals that of Justice Scalia, and when the two begin attacking a lawyer's argument, it can seem more like a feeding frenzy than a methodical legal inquiry. The two will commonly follow the same line of questioning and explain to advocates the reasoning behind each other's questions. Chief Justice Roberts' questions often reach to the crux of an argument where a case could move in either direction depending on the competency and soundness of an advocate's argument. Like Justice Scalia, Chief Justice Roberts' activity is typically most prominent in an advocate's argument with whom he will vote against. His interaction in oral arguments will vary with the cases, and simply because Justice Scalia is heavily involved in a case does not mean that Justice Roberts will be engaged. With the greatest power to control

the flow of oral arguments, Chief Justice Roberts holds the unique ability to influence the justices' questions. I have witnessed numerous occasions when he ended oral argument while other justices were leaning forward to ask questions. But I have also seen occasions when justices will ask for a few more minutes to resolve important questions in a case and he will permit the time necessary to resolve lingering questions. At times, Chief Justice Roberts also prevent justices from interrupting an advocate's response during heavy handed questioning; a tactic I would like to see him use more often. His control of the Court has grown in time, and when the more senior justices begin stepping down, I believe we will witness a Court that is more measured and controlled in its questioning. Given Chief Justice Roberts powerful position, he is ironically the most polite and considerate justice when it comes to the treatment of advocates. He often will give the petitioner's advocate an extra two minutes for a rebuttal even when they have exhausted their thirty minute limit due to vigorous questioning by the Court. In addition to controlling oral argument, Chief Justice Roberts is also responsible for conducting the business of the Court in admitting lawyers to the Supreme Court Bar. He makes this a situation in which lawyers genuinely feel welcome, no small feat since he welcomes lawyers every day before the beginning of oral argument. He has a kind sense of humor which he may use to gently tease a lawyer or correct a mistake. During one instance, in which a group of lawyers was being admitted into the bar, the nominating lawyer failed to recite the mandatory statement of "I am satisfied they possess the necessary qualifications." Without sternly chastising the lawyer, Roberts grinned and asked "and how do you find their qualifications?," followed

by a roar of laughter from the audience. The lawyer jumped to the podium and sheepishly read his statement while Roberts looked on with amusement, nodding his head after the lawyer's statement. More than any other justice, I believe we will see Chief Justice Roberts approach to oral argument change as he matures into his role as chief. The Rhenquist court was known for its fervent and passionate approach to oral arguments, but I believe Robert's court will reflect a very different personality, in part because he will have so many new justices joining him on the Court. Justices Stevens, Ginsburg, Souter, Scalia, and possibly Thomas will most likely all step down within ten years, providing Roberts with the opportunity to mold and shape the behavior of the new incoming justices.

When I began my observation of the Court, many lawyers and scholars urged me to pay attention to Justice Scalia's dangerous hypotheticals which they claimed would often trap advocates in their own arguments. However, in my time at the Court, I witnessed Justice David Souter lay far more traps for advocates than any other justice, and most advocates walked blindly into his setup. Justice Souter's mental acuity in cases can be somewhat astounding and overwhelming. He is capable of using simple hypotheticals to draw out significant connections to the case at hand, and he often pursues a line of questioning until it has been directly answered by the advocate. He and Justice Scalia spar regularly through advocates, and he often appears irritated when Justice Scalia prevents an advocate from walking into one of Justice Souter's traps. A patient and polite justice, he will regularly allow other justices to finish their line of questioning before pursuing his own, but this occasionally causes him to be left with

questions at the end of oral arguments without the time with which an advocate may answer them. Chief Justice Roberts will regularly end oral arguments while Justice Souter is leaning forward to ask a question. If Justice Scalia and Chief Justice Roberts are occasional teammates in oral arguments, then Justice Souter and Justice Ginsburg may also assist one another. Justice Souter will regularly defend Justice Ginsburg's line of questioning, following a line until he believes her position to be satisfied. In fact many advocates regularly confuse Justice Souter and Justice Ginsburg in oral argument, occasionally calling Justice Souter, Justice Ginsburg. Where Justice Ginsburg can be polite and soft-spoken, though not un-opinionated, Justice Souter is more direct and stern in the control he applies to oral arguments. In one oral argument I observed, Justice Souter disdainfully remarked to a lawyer who had been evading his questions that he found her argument "utterly irrational."<sup>237</sup> It was the only moment of discourteous behavior I witnessed from Justice Souter. Although Justice Souter and Justice Scalia regularly find themselves on different sides of a case, Justice Souter often has a more balanced approach to asking questions in oral arguments. This should not suggest that he does not pay more attention to the side with whom he will vote against, but that he does so with less frequency than Justice Scalia or Chief Justice Roberts. Strangely, Justice Souter and Justice Scalia will talk amongst themselves occasionally at oral argument, and they appear to have a friendly relationship despite their legal differences. Finally, Justice Souter has the polite habit of always waiting for Justice

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<sup>237</sup> See oral argument for *Cone v. Bell*, 556 U.S. \_\_\_\_ (2009).



Ginsburg to exit the courtroom before he does, a courteous habit that does not go unnoticed.

Justice Stephen Breyer may be one of the most intriguing justices on the bench because he displays the most visceral reactions to advocates' statements. Justice Breyer sits on the end of right side of the bench. At this position he cranes his neck to make eye contact with advocates, and his reactions to advocates' statements may be easily overlooked because he sits at the periphery. Justice Breyer is prone to shaking his head or shrugging his shoulders in disagreement. He may hold his hand over his brow while listening, then quickly snap it forward in response to an advocate's statement, lean back in his chair with his arms crossed rocking back and forth, shaking his head in disagreement. During moments of excitement, Justice Breyer will lean forward and turn to make eye contact with his colleagues as support for a particular position. He also regularly bypasses the comments of an advocate, speaking directly to other justices about the propositions they have made. This can generate confusing moments for advocates because they are uncertain whether Justice Breyer is addressing their comments or the comments by another justice. His physical behavior is by far the most animated of the justices and assists observers in understanding where he stands on issues.

Justice Breyer is notorious for asking long winded hypotheticals, and he can occasionally get lost in his own hypotheticals, but generally I have found that they cut to essence of the case. He has the ability to frame a hypothetical in such a way that foregrounds the tension between the advocate's arguments in a case, and will clearly ask

for a lawyer to convince him of their position based upon his hypothetical. His behavior in oral argument suggests that he may be more open to advocates' attempt at persuasion than other justices. Justice Breyer also occasionally asks the Court to allow an advocate to reply to his specific question for one minute. The other justices respect this unusual tactic, giving Justice Breyer his minute, and Justice Breyer will let the advocate know when the minute is up, and at this point the other justices will begin to interrupt with their own questions. Although the other justices respect Justice Breyer's hypotheticals and timed responses, sometimes his excitement in oral arguments prevents him from reciprocating a similar respect. He regularly interrupts advocate's responses to other justices, provoking irritation and consternation from some justices. I have witnessed Chief Justice Roberts prevent Justice Breyer from interrupting an advocate's response to one of Justice Alito's hypotheticals. More than any other justice, Justice Breyer is candidly honest, telling advocates where he has problems with their argument, explaining the strengths or weaknesses in their case, and revealing where he stands and why. His openness and honesty seem to provide advocates with a unique chance either to persuade him based upon his openness, or abandon pursuit for his support because of his staunch opposition.

In a brief discussion with Justice Breyer, I asked about how he prepares for oral argument. He mentioned that his clerks write up a memo concerning the case. He reads the brief before reading the memo, making questions about the case as he goes. He then reads the memo from his clerks and reads the briefs again making further questions if necessary. Justice Breyer emphasized that he reads every brief twice before oral

argument, and mentioned that his approach to oral argument is “straightforward” because he simply asks the questions he develops from the lawyer’s briefs and his clerk’s memos. He seemed somewhat puzzled that I might find any significance to his preparation for arguments. Following up this question I inquired about his style of argument because of his unique hypotheticals. He replied that his hypotheticals are designed to be very clear in both the question he is asking as well as the implications surrounding an advocate’s. Specifically, Justice Breyer credited his style in oral argument to his time as a teacher which made him sensitive to understanding that his questions needed to be stated in a certain fashion to achieve the necessary response from students. To his credit, Breyer’s approach to oral argument is clear and concise, causing advocates very little confusion in his questions. While reading an opinion, Justice Breyer continues his pedagogical demeanor, explaining the case’s history and the Court’s judgment in an egalitarian manner which most lay people in the courtroom can follow. Making complex legal issues intelligible to lay people proves a difficult skill, but Justice Breyer excels in this task, and the crowd seems to appreciate understanding the rationale behind the Court’s decision.

Justice Ruth Bader Ginsburg is a deceiving figure on the Court. Her age seems to be quite literally pushing her down as her shoulders continue to stoop lower. While looking up at the Court, it is difficult to see Justice Ginsburg, and when she leans back, some advocates may not see her at all, one reason why advocates may confuse her with Justice Souter. Her soft voice also makes it difficult to hear her questions. Despite her petite frame and soft voice, Justice Ginsburg can be a formidable force in oral argument.

She does not shy away from asking questions, although she can tend to be more reserved while other justices are more active. Most of the justices respect Justice Ginsburg's line of questioning without interrupting or steering the debate to a different issue, and she will pursue her line of questioning until the advocate has satisfied her inquiry. She remains feisty enough to spar with Justice Scalia when he makes his aggressive quips. More than any other justice, Justice Ginsburg treats oral arguments very seriously, and I have never witnessed her make a joke or laugh during the Court's humorous moments.

Similar to Justice Ginsburg, Justice John Paul Stevens is also showing his age. The oldest member of the Court, 90 years old, he will likely be retiring soon. A fairly active participant, Justice Stevens tends to be more engaged in issues that are of direct interest to him. He has a habit of asking questions that are philosophically interesting to him, but not directly relevant to a case. For example, he may inquire into a foreign country's stance on certain issues, just to satisfy his own interest or prompt the other justices to think past the Constitution. With a softer voice than any other justice, advocates occasionally have difficulty hearing questions from Justice Stevens. Often times in good humor, Justice Stevens regularly smiles and will make jokes with the advocates and other justices. A beloved member of the Court, his insight and questions provide lawyers with a real challenge at times.

Justice Anthony Kennedy may be one of the most important justices on the Court at this time. His presence mediates the liberal and conservative voting block, regularly supporting each side depending on the issues in a case. Because Justice Kennedy is often the "swing" vote in a case, advocates will often address their arguments to gain his

favor. Other justices will also try to win his support by either heavily attacking a lawyer or assisting a lawyer by providing another possible argument. Similarly, other justices look to make eye contact with Justice Kennedy when making their arguments to the Court. In a Court with so many other dynamic justices, Justice Kennedy is the most highly scrutinized because his vote will often decide a case on contentious social issues. While onlookers closely observe Justice Kennedy's behavior in oral argument, he provides little to suggest how he may be leaning in a case. Justice Kennedy remains fairly stoic during arguments, resting his head on his fist while leaning back in his chair, his furrowed brow giving indication of thought, but not prejudice. When Justice Kennedy grows excited or agitated, he begins to rock back and forth in his chair and will suddenly lean forward to ask an important question. His quiet demeanor should not be taken for granted because if an advocate fails to answer one of his positions, or if Justice Kennedy vehemently disagrees with the advocate's position, then Kennedy's disdain becomes apparent as he vigorously argues with the advocate bobbing back and forth between his chair and his microphone. Observers can frequently witness Justice Kennedy's frustration and his anger can make for tense moments in the courtroom.

Justice Samuel Alito does not usually ask many questions during oral arguments, and it is unclear whether he is adjusting to his position on the Court, if his seat at the far left of the bench prevents interaction, or if he simply has few questions to ask about a case. Justice Alito regularly leans forward on the bench resting his head on his hand; however, he does not seem to pay advocates much attention in oral arguments, regularly appearing bored by the process. Justice Alito often closes his eyes and fights to stay

awake during oral arguments, especially during the second and third argument of the day. Justice Alito addresses and questions advocates in a respectful manner, but other justices tend to interrupt his line of inquiry, leaving his questions unanswered unless a lawyer is astute enough to return to his question.

Between Justice Souter's luddite practices, Justice Scalia's pugnacious arrogance, and Justice Breyer's never ending hypotheticals the Court is full of characters; however, none are quite as intriguing as Justice Clarence Thomas who has not spoken a word in oral argument in over four years, or more than 300 court cases. Justice Thomas last spoke on February 22, 2006 in *Bowles v. South Carolina*, and his critics regularly suggest that his silence proves that oral arguments make little difference to him. Some of Justice Thomas' behavior seems to support his critics, particularly when he leans back in his chair and puts his hand over his eyes. While on the surface, covering one's eyes may suggest indifference, it can also suggest intense listening or thought, especially when after a few minutes with his eyes covered Justice Thomas will respond to an advocate's statement by bolting upright in his chair and flipping through the briefs before him. Justice Thomas' physical activity in oral argument exceeds that of any other justice. He requests more cases that advocates cite in their arguments, and he reads through more of the briefs than any other justice. While the other justices appear to be involved in oral argument because of the rate in which they ask questions, Justice Thomas' behavior evokes the image of a justice who listens and considers an advocate's argument, rather than a justice who argues, disagrees, strategizes, and analyzes an argument only to find its weaknesses instead of its validity.

Justice Thomas' also has an unusual habit of speaking with Justice Breyer and Justice Kennedy during oral argument, often laughing raucously with Justice Breyer. His behavior with the other two justices distracts the audience at times, and must prove a difficult interruption for advocates to overcome. Reporters and lawyers have often wondered at the justices' engagements, pondering what could provoke so much laughter between them. In a discussion with the clerks of the Court seated behind Justice Breyer and Justice Thomas, they disclosed that the two justices speak and joke primarily about legal matters. When asked if the two justices ever stray into discussions outside of legal matters, the clerks could not remember a particular incident in which the justices spoke of extra-legal matters, but also mentioned that if they did, then it was only very rarely because they spoke so frequently about legal concerns. Justice Thomas' oral activity in arguments is scant. He has spoken 281 words since the Court began identifying justices in their transcripts in the beginning of the 2004 term.<sup>238</sup> And he, perhaps more than any other justice on the bench, is an enigma because he so rarely voices his opinion in oral argument.

Each justice's unique rhetorical discursive style adds a dimension to the Court's communicative interaction, and they all use oral argument for a variety of purposes. Some justices tend to use it as a platform to persuade other justices to adopt their argument, others use it more for a careful consideration of issues, and each probably understands the function of oral arguments somewhat differently than their colleagues. Yet all would probably agree that they want to fairly consider a case, as well as provide

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<sup>238</sup> Mark Sherman, "Silent Justice Thomas: Not a Word Spoken," *www.USA Today.com* 5/18/2007.

advocates with a fair opportunity to present their case. “Equal Justice Under Law” may be an ideal, but it is an important one justices should strive to uphold, even in oral arguments, because oral argument is a site where justices rhetorical discursive interaction could both negatively influence their ability to evaluate a case, as well as hamper an advocates’ ability to deliver his or her argument. The very act of justices speaking in oral arguments and the disruption of argumentation impacts their decision making ability.

### **Arguing about “Bong Hits 4 Jesus”**

Justices may employ a variety of styles of decision making, and scholars often attribute justices with a particular philosophical tradition. However, legal scholars, political scientists, and psychologists have largely ignored the role communication in oral arguments plays in influencing a justice’s decision making ability. While the previous section highlighted the various functions of oral argument and generalized each justices’ rhetorical discursive style, the following section analyzes the oral argument from *Morse v. Frederick*. Because Timothy Johnson’s research suggests that the importance of oral argument revolves around the justices’ ability to gather information as strategic actors, an examination of oral arguments should reveal a relatively measured approach by justices in their pursuit of a fair decision. Johnson’s determination about justices’ behavior derives from longitudinal studies with little concern for individual differences between justices. He ignores micro level interaction between advocates and justices and emphasizes strategic decision making on the larger macro level in which oral arguments are only one key component. Johnson’s study fails to consider how



communicative interaction within oral argument could impact how justices gather information, and hence behave in contrast to the strategic actor model. This case study attempts to reveal how justices' interactions may oppose the strategic actor, thus introducing Sensemaking as an additional model of decision making which may account for justices' communicative interactions in *Morse v. Frederick's* oral argument. I have chosen to use *Morse v. Frederick* because it serves as an ideal case that foregrounds both sensemaking and strategic actor behavior by the justices.

*Morse v. Frederick* was a highly publicized 2007 case in which a student, Joseph Frederick, claimed First Amendment protection for his sign that read "Bong Hits 4 Jesus." The student unfurled his banner across the street from where his fellow high school students were gathering to watch the passing of the Olympic torch. Principal Deborah Morse believed the sign promoted the use of illegal drugs and directed Frederick to take down the sign. When Frederick refused to take the sign down, Morse confiscated the sign and later suspended him. Frederick appealed the suspension to the school's superintendent who upheld his suspension. In 2007 the Supreme Court handed down a 5-4 ruling in favor of Morse, determining that schools have an interest in safeguarding students from speech that can be reasonably interpreted to encourage illegal drug use. Kenneth Starr and Edwin Kneedler (Deputy Solicitor General) represented Deborah Morse, and Douglas Mertz represented Joseph Frederick. Topically, the case provides an interesting and controversial issue of First Amendment rights from which to gauge justices' behavior. Oral argument in the case was vigorous and nearly all the justices were involved in questioning at some stage. I have repeated

some of the methodological approaches listed in chapter III to remind readers of the various categories implemented in the study.

The following case study examines oral argument at the micro or rhetorical discursive level by studying the communicative interaction between justices and lawyers to better understand how judicial interaction influences information gathering and argument development. In order to evaluate judicial interaction within oral arguments, I analyzed the oral arguments in *Morse v. Frederick* by posing the following questions to consider judicial communication in a variety of areas:

1. Do justices demonstrate a substantial preference for one counsel over another in their:
  - a. challenging of counsels,
  - b. permitting counsels an equal opportunity to respond,
  - c. frequency at which they interrupt counsels,
  - d. assistance of counsels arguments, and
  - e. treatment of counsels?

To evaluate the case, I obtained transcripts of oral argument from the Supreme Court website, and listened to oral arguments on Oyez.org. In analyzing arguments, I tallied the number of instances in which justices interrupted lawyers based upon the actual transcript as well as listening to the argument. Argument transcripts only record mid sentence interruptions, but audio files enabled me to discern interruptions not captured in the transcript. While interruptions can reveal a more challenging rhetorical environment, understanding how frequently justices challenged, assisted, or neutrally questioned

counsels is also important in understanding rhetorical discursive interaction. To determine whether justices equally challenged counsels, I divided justices' statements or questions between those they made during the petitioner and respondent's oral argument, and then categorized statements or questions based upon whether they challenged or assisted the lawyer's argument. I also listened to the tone of their voice for any sense of hostility or sarcasm. This enabled me to determine how commonly justices supported or challenged counsels. I deemed challenging statements/questions those which questioned the argument or proposed a hypothetical which tested the counsel's argument (e.g. "That doesn't make any sense to me. Does it depend on his intent, whether or not he intended to be truant that afternoon?").<sup>239</sup> I considered assisting statements/questions to be helpful to the lawyer in framing or emphasizing aspects of the argument (e.g. Scalia: "This banner was interpreted as meaning smoke pot, no?" Starr: "It was interpreted exactly, yes").<sup>240</sup> I recorded neutral statements/questions as those statements by justices asking for small matters of fact, or references in the brief (e.g. "Can I ask you another record point, just so I know where to look").<sup>241</sup> By achieving a more nuanced understanding of justices' statements, we can better understand justices' rhetorical discursive interaction. Finally, in order to determine equal speaking time, I timed speaking moments for all participants in oral argument. I did not include moments in which a justice or lawyer was forced to repeat a statement or question. Quantitative

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<sup>239</sup> *Morse v. Frederick*, 551 U.S. \_\_\_\_ (2007) 55.

<sup>240</sup> *Id.* at 8.

<sup>241</sup> *Id.* at 46.

recordings provide an efficient means of capturing iterations without listing to readers each assisting or challenging statement made by the justices. Qualitative analysis compliments quantitative findings by providing a more transparent examination of the justices' treatment of counsels.

Using a qualitative approach to understand whether justices showed preference for one counsel over another, I compared whether or not justices assisted counselors equally, by providing them with frames or arguments that strengthened their position. I also compared whether justices equally ridiculed or denigrated counselors to determine if justices treated counselors preferentially.

Lastly, my analysis has been informed by my firsthand observations of nearly fifty oral arguments before the Supreme Court, interviews with top advocates who regularly argue before the Court, and a discussion about oral argument with Associate Justice Stephen Breyer. Witnessing oral argument and learning about the physical behavior and rhetorical discursive interaction of justices provided a level of understanding which more fully informed my reading of the transcript from *Morse v. Frederick*. My experience at the Court forced me to consider quantitative and qualitative approaches that could capture the dynamic interactions occurring within oral argument. Observation of physical behavior and rhetorical interaction at the Court revealed the displeasure justices feel when their line of questioning has been interrupted. At times, justices would lean forward to ask a question, and before uttering their remark, another justice would speak first and shift the course of inquiry. Justices appeared to be irritated by the rhetorical interaction of other justices, and I could not help but wonder

how many justices still held questions they wanted to ask, or how many questions were never answered because of another justice's interruption.

### **Rhetorical Discursive Interaction in *Morse v. Frederick***

In considering the rhetorical discursive interactions of justices, readers should keep in mind that the strategic actor model suggests that we should witness a balanced approach by justices in their gathering of information. Realistically, we should not expect justices to have an identical number of questions or statements for each advocate, but we should expect to see a relatively balanced approach. The analysis begins with considering quantitative data: frequency of interruptions, tally of the types of statements and questions uttered by justices, and the speaking time frames for both justices and lawyers. Quantitative data captures the phenomena of rhetorical discursive interaction in ways that qualitative methods cannot, such as providing information on frequency rates and speaking times.<sup>242</sup> Following the quantitative data, qualitative data presents a picture of the justices' treatment of counsels. Both quantitative and qualitative analysis present a comprehensive understanding of the justices' rhetorical discursive interaction and its impact upon information gathering and argument development. As the term rhetorical discursive interaction suggests, readers should consider how the justices' interactions influence persuasiveness and understanding. Justices' lopsided or unbalanced

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<sup>242</sup> Traditional quantitative analysis cannot be applied reliably to the communicative interaction captured by quantitative frames. T-tests and Chi squares cannot be used to reveal much because each oral argument is different and we cannot assume that each case should, or will, elicit the same, or "average," level of interaction by the justices. In addition T-tests and Chi squares prove unreliable because questioning by justices can be lopsided with different justices taking similar amounts of time when speaking to different counsels, thus negating any "statistical significance."

interactions will be referred to as “rhetorical discursive bias,” but this communicative “bias,” should not necessarily be equated directly with judicial bias.<sup>243</sup>

This case study begins with an evaluation of interruptions. Interruptions provide a basic means of understanding how justices controlled oral arguments for both parties. If one lawyer suffered significantly less interruptions than the competing lawyer, then it seems likely that some justices may be reflecting a communicative bias in their questioning and gathering of information.

Table 4.1 lists the number of interruptions generated from both transcript and audio file.

Table 4.1 *Interruptions*

|                   | Scalia | Roberts | Kennedy | Alito | Breyer | Thomas | Souter | Ginsburg | Stevens | Total |
|-------------------|--------|---------|---------|-------|--------|--------|--------|----------|---------|-------|
| <b>Petitioner</b> | 8      | 3       | 6       | 3     | 4      | 0      | 11     | 4        | 6       | 45    |
| <b>Respondent</b> | 19     | 13      | 9       | 0     | 11     | 0      | 3      | 8        | 0       | 63    |

<sup>243</sup> In using the term “bias” while referencing a justice’s position, I am referring to a hunch or leaning, as well as a solid conclusion. Justices will likely have a position they are leaning towards, and they may also have a primary party in mind who should win the case. An interactional bias refers to lopsided communication or speaking more in one party’s argument than in another. The significance of this interactional bias lies in communication’s ability to shape cognition and thereby influencing justices’ decision making ability.

Justices Scalia, Kennedy, Alito, Thomas, and Chief Justice Roberts voted in favor of the petitioner, while Justices Souter, Breyer, Ginsburg, and Stevens voted for the respondent. Interestingly, some justices questioned the counsel whom they voted against more vigorously than the counsel they ended up supporting. Justice Scalia and Chief Justice Roberts interrupted respondent's counsel significantly more than they interrupted petitioner's counsel. Justice Scalia interrupted over twice as often in respondent's argument than he did in petitioner's argument. Likewise Chief Justice Roberts interrupted over four times as often in respondent's argument than in petitioner's. Justice Breyer also interrupted nearly four times as often in the respondent's time than in the petitioner's. Although Justice Breyer did not join the majority he concurred and dissented in part. At the time, Justice Breyer believed the Court "need not and should not decide this difficult First Amendment issue on the merits. Rather [he] believ[ed] that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more."<sup>244</sup> In effect, Justice Breyer joined the majority in ruling against Joseph Frederick's right to collect monetary damages. Chief Justice Roberts and Justices Scalia and Breyer's rhetorical discursive interaction reflects a clear communicative bias and potential judicial bias in their approach to questioning, given their taxing interruptions of respondent's counsel versus their minor involvement in petitioner's argument. In contrast with the majority's opinion but reflective of biased communicative interaction, Justices Souter and Stevens were much more active in

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<sup>244</sup> *Morse v. Frederick*, 551 U.S. \_\_\_\_ (2007).

petitioner's argument than they were in respondent's. Justices Kennedy, Alito, and Ginsburg's interaction reflect less of an interactional bias.

The number of interruptions only provides a partial sense of understanding justices' rhetorical discursive interaction, and fails to provide a more nuanced understanding of why justices interrupted. Yet what this table does accomplish is to reveal the disparity in which justices can treat opposing counsels. Based on interruptions in oral argument, the justices do not seem to be interacting equally with counsels, indicating a potential for rhetorical discursive bias. This table coupled with the next provides a better understanding of how and why justices may have interrupted lawyers.

The statements a justice makes allows us to better understand the purpose of their interruptions, but it also provides a means of learning how justices may have challenged or supported each counsel. Table 4.2 lists the number of challenging (C/), assisting (A/), or neutral (N/) statements or questions posed to each counsel by the justices.



Table 4.2 *Statements*

|                | Scalia    | Roberts   | Kennedy   | Alito    | Breyer    | Thomas   | Souter    | Ginsburg | Stevens  |
|----------------|-----------|-----------|-----------|----------|-----------|----------|-----------|----------|----------|
| <b>C/pet.</b>  | 1         | 2         | 7         | 2        | 5         | 0        | 9         | 6        | 5        |
| <b>A/pet.</b>  | 7         | 1         | 0         | 0        | 0         | 0        | 0         | 0        | 0        |
| <b>N/pet.</b>  | 0         | 0         | 3         | 1        | 0         | 0        | 3         | 0        | 2        |
| <b>Total</b>   | <b>8</b>  | <b>3</b>  | <b>10</b> | <b>3</b> | <b>5</b>  | <b>0</b> | <b>12</b> | <b>6</b> | <b>7</b> |
| <b>C/resp.</b> | 28        | 14        | 10        | 0        | 9         | 0        | 4         | 5        | 0        |
| <b>A/resp.</b> | 0         | 0         | 0         | 0        | 0         | 0        | 0         | 2        | 0        |
| <b>N/resp.</b> | 0         | 1         | 0         | 0        | 10        | 0        | 0         | 2        | 0        |
| <b>Total</b>   | <b>28</b> | <b>15</b> | <b>10</b> | <b>0</b> | <b>19</b> | <b>0</b> | <b>4</b>  | <b>9</b> | <b>0</b> |

Table 4.2 provides a better understanding of the justices' rhetorical discursive interaction because it breaks down how justices challenged, assisted, or neutrally posited questions for counsels. In conjunction with Table 4.1, the data reveals that Justice Scalia kindly assisted the petitioner's counsel seven times, while heavily challenging the respondent. Justice Roberts appeared to minimally assist the petitioner's counsel, but also strongly challenged the respondent's counsel. Although in Table 4.1, Justice Breyer appears to overly interrupt the respondent's counsel, this table clarifies that his interruptions were most likely due to neutral brief oriented questions or statements, in which he inquired about where to read various affidavits in the brief. Justices Souter and Stevens both questioned the petitioner's counsel more stringently than the respondent's counsel. Table 4.2 further indicates a presence of rhetorical discursive bias in the

justice's interactions, but how much actual time do the justices control versus the lawyers?

Speaking time is an important component because lawyers only receive 30 minutes for oral argument, and if a justice dominates the speaking time of a lawyer, then it can substantially limit what a lawyer can communicate about his or her case. Table 4.3 displays petitioner's oral argument including rebuttal time. Total speaking time 30 minutes 46 seconds. Table 4.3 also displays respondent's oral argument. Total speaking time 30 minutes 16 seconds.

Table 4.3 *Speaking Time*

|              |  | <u>Petitioner</u>                          |                 |         |         |         |        |  |        |          |          |         |  |
|--------------|--|--|-----------------|---------|---------|---------|--------|--|--------|----------|----------|---------|--|
|              |  | <i>Starr</i>                               | <i>Kneedler</i> | Scalia  | Roberts | Kennedy | Alito  | Breyer   | Thomas | Souter   | Ginsburg | Stevens |  |
| Seconds      |  | 476  | 321             | 82      | 79      | 88      | 43     | 96   | 0      | 284      | 145      | 51      |  |
| <b>Total</b> |  | <b>Pet. = 893 (14 minutes 53 seconds)</b>  |                 |         |         |         |        | <b>Justices = 868 (14 minutes 28 seconds)</b>  |        |          |          |         |  |
|              |  | <u>Respondent</u>                          |                 |         |         |         |        |  |        |          |          |         |  |
|              |  | <i>Mertz</i>                               | Scalia          | Roberts | Kennedy | Alito   | Breyer | Thomas   | Souter | Ginsburg | Stevens  |         |  |
| Seconds      |  | 674  | 289             | 197     | 58      | 0       | 308    | 0  | 101    | 84       | 0        |         |  |
| <b>Total</b> |  | <b>Resp. = 674 (11 minutes 14 seconds)</b> |                 |         |         |         |        | <b>Justices = 1037 (17 minutes 17 seconds)</b> |        |          |          |         |  |

A comparison between petitioner and respondent reveals a substantial difference in the amount of speaking time afforded to each counsel. Oddly, during respondent's argument, justices controlled more speaking time than the actual lawyer, and they presented an obvious advantage to the petitioner's counsel. Petitioner's counsel presented for 3 minutes and 39 seconds longer than the respondent, over a 10% time advantage. Justices largely controlled the three minute time difference in their

questioning. Justice Scalia and Chief Justice Roberts engaged in questioning over five minutes longer in respondent's argument than petitioner's. Between Justices Breyer, Scalia, and Chief Justice Roberts, the three controlled over 13 minutes and accounted for nearly 77% of justices' speaking time during respondent' oral argument. During both petitioner's and respondent's oral arguments, these three justices accounted for over 55% of justices' entire speaking time; this third of the justices clearly dominated the time accorded to the other two-thirds of the Court.

For those justices who both participated in oral arguments and voted against the respondent (Scalia, Roberts, Kennedy, Breyer), these justices controlled 82% of the justice's speaking time during respondent's oral argument. Likewise, those justices who voted against the petitioner's counsel (Souter, Ginsburg, Stevens, and Breyer (since he concurred and dissented in part)) controlled over 66% of justices' speaking time during petitioner's oral argument; without Justice Breyer the trio still controls over 55% of justices' speaking time. The justices' support for a counsel whom they end up voting against suggests behavior more in accordance with sensemaking than the strategic actor. One would expect to see a clear rhetorical discursive bias in judicial interaction towards a counsel who justices support rather than with whom they disagree; however, justices seem to actively refute and undermine the argument which threatens the position with which they most identify, as if they have a "champion" who they want to win the case. Justice Scalia appears guilty of this championing behavior as he assisted the petitioner's lawyers seven times in making their argument, and attacked the respondent's lawyer 28 times. Chief Justice Roberts follows a similar pattern of interaction. Although he did

not assist the petitioner's lawyers, but in one instance, he only challenges the petitioner's lawyers twice, and he heavily attacks the respondent's lawyer 14 times, taking up over three minutes of speaking time. The attacks upon an oppositional counsel may indicate sensemaking behavior as justices eliminate oppositional perspectives and cognitively talk themselves into a position of dismissing oppositional arguments.

How did the justices' domination and control of speaking times impact the advocates? And why are speaking frames important? The amount of time justices afford to an advocate to articulate a complex argument is a significant advantage. The more time a speaker has to put forth an argument then the clearer and more persuasive their message may become. Thirty minutes is already an exceedingly difficult timeframe in which a lawyer must present arguments and answer questions, but if each response is limited by justices' interruptions, then the task grows even more Sysphean.

Table 4.4 displays the number of speaking instances in which lawyers were able to speak for a certain timeframe.

Table 4.4 *Lawyer's Speaking Timeframes*

| <b>Seconds</b>    | <b>1-10</b> | <b>11-20</b> | <b>21-30</b> | <b>30-40</b> | <b>40-50</b> | <b>50+</b> |
|-------------------|-------------|--------------|--------------|--------------|--------------|------------|
| <b>Petitioner</b> | <b>27</b>   | <b>18</b>    | <b>7</b>     | <b>6</b>     | <b>3</b>     | <b>1</b>   |
| <b>Respondent</b> | <b>57</b>   | <b>15</b>    | <b>3</b>     | <b>3</b>     | <b>0</b>     | <b>0</b>   |

Obviously, given the difference in speaking times justices provided each counsel, we should not expect similar numbers, yet the disparities in speaking timeframes are substantial. If justices' interruptions limit the timeframe of a response, then advocates lack the time to appropriately respond to questions, or lack the time to articulate the intricacies of an idea. Advocates enjoy rambling explanations, and justices should step in to redirect lawyers if necessary, but in this case, the respondent's counsel was forced to make 57 statements in ten seconds or less, meaning 73% of the advocate's statements were limited to responses in ten seconds or less. In contrast, the petitioner's advocate made 27 or 44% of their statements in ten seconds or less, and they were provided with other opportunities to present complex responses to justices, which were withheld from the respondent.

### **Quantitative Summary**

A summary of quantitative analysis suggests that justices' rhetorical discursive interactions may reveal preferential treatment for counsels. In general, the respondent's counsel faced significantly more questions and a much more aggressive style of questioning than did the opposing counsel. The respondent's counsel was also interrupted more frequently and his response time was significantly more limited than the petitioner's. The petitioner faced more stringent questioning by those justices who voted against them as well, but not to the degree in which the respondent's counsel was questioned. Furthermore, Justices Kennedy, Alito, and Ginsburg all maintained relatively balanced questioning and did not reflect a significant bias in their rhetorical discourse. Lastly, justices did assist one counsel more than the other, but Justice Scalia

was the only justice who significantly and disproportionately assisted one counsel more than another. However, any assistance from a Supreme Court justice can be substantial for one's case, because a counsel now has an advocate who carries legal and social authority that can defend and advance an argument for him or her.

### **Qualitative Analysis**

While the quantitative data enables us to answer the research areas abstractly, qualitative analysis provides the opportunity to reveal the level of respect or disrespect justices show towards counsels. In this case, qualitative data confirm that justices were less concerned with gathering information and exploring all possible arguments through fair interactions with counsels. This section provides further evidence of rhetorical discursive bias in justices' interactions by examining how justices assist counselors in both constructing arguments, and denigrating a counselor's position within oral argument.

It seems unusual for justices to help an advocate frame an argument or rescue them from another justice's hypothetical situation. However, because justices have read the case's briefs and have some intimate knowledge of their fellow justices' inclinations "judges may use oral argument as a form of internal advocacy. They may stake out tentative positions in advance of the decision conference" to persuade their colleagues of certain positions.<sup>245</sup> In order to generate favor for their own positions, justices may help the advocate, whom they prefer, to construct an argument favorable to the justice's

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<sup>245</sup> Ruggero Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 32 (Notre Dame Law School 2003).

position. In *Morse v. Frederick* justices assisted both counsels but to disproportionate degrees. For example, Justice Scalia helps Mr. Starr avoid an unfavorable hypothetical advanced by Justice Breyer:

Justice Scalia: So you want to get away from a hypothetical then. I don't know why you try to defend a hypothetical that involves a banner that says amend the marijuana laws. That's not this case as you see it, is it?

Mr. Starr: Well it's certainly not this case, but—

Justice Scalia: This banner was interpreted as meaning smoke pot, no?

Mr. Starr: It was interpreted—exactly, yes . . . .<sup>246</sup>

Justice Scalia not only presents Mr. Starr with an escape from Justice Breyer's unfavorable hypothetical, but he also assists Mr. Starr in framing his argument around “a banner that was interpreted as meaning smoke pot.” Justice Scalia narrows the realm of judicial inquiry by establishing early on in Mr. Starr's argument that Frederick's banner advocated drug use. Justice Scalia assists Mr. Starr with his argument again when he redirects Justice Kennedy's inquiry:

Justice Scalia: Why do we have to get into the question of what the school board's policy is and what things they can make its policy? Surely it can be the—it must be the policy of any school to discourage the breaking of the law. I mean suppose this banner had said kill somebody, and there was no explicit regulation of the school that said you should not, you should not foster murder. Wouldn't that be suppressible?

Mr. Starr: Of course. That is not—

Justice Scalia: Of course it would, so—

Mr. Starr: The answer is yes.

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<sup>246</sup> *Morse v. Frederick*, 551 U.S. \_\_\_\_ (2007) 8.

Justice Scalia: Why can't we decide this case on that narrow enough ground that any school, whether it has expressed the policy or not, can suppress speech that advocates violation of the law?

Mr. Starr: I think it can . . . .<sup>247</sup>

Justice Scalia again provides a favorable situation with which Mr. Starr can simply agree. Justice Scalia's distillation and clarification of the case provides a compelling argument for Mr. Starr, and Justice Scalia's comments could easily have presented the case in such a way as to agree with or influence the commitments of other justices. These two examples represent four out of the eight speaking turns taken by Justice Scalia in the petitioner's portion of oral argument, and they clearly benefitted Mr. Starr's argument and the standing of the petitioner's position. As we shall soon see, Justice Scalia provided no similar assistance to Mr. Mertz, going so far as to even ridicule his position.

As Justice Scalia provided significant assistance to Mr. Starr, so too did Justice Ginsburg aid Mr. Mertz in the framing of his argument, though not to the same degree as Justice Scalia. Justice Ginsburg interrupts one of Justice Scalia's many questions, but instead of redirecting her inquiry as Justice Scalia had done in the previous two examples, she clarifies Justice Scalia's line of questioning:

Justice Ginsburg: But couldn't the school, couldn't the school board have a time, place, or manner regulation that says you're not going to use the halls to proselytize your cause, whatever it may be?

Mr. Mertz: I believe that's correct.

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<sup>247</sup>*Id.* at 8.



Justice Ginsburg: You could have reasonable rules of decorum for what goes on inside the school building.

Mr. Mertz: Right.<sup>248</sup>

Justice Ginsburg's questioning assists Mr. Mertz in making his case, but her assistance should not be considered a sign of favoring his position, because she later ridicules one of his arguments, stating "I couldn't understand that somehow you got mileage out of his being truant that morning?"<sup>249</sup> Although Justice Ginsburg assists Mr. Mertz in framing his argument, her action should probably be understood as an act of clarification rather than preferential treatment.

Thus far justices have helped both counsels, although to varying degrees, but when coupled with the treatment of both counsels a new picture begins to develop. Justices disparage the arguments of petitioner's counselors only once when Justice Alito tells Mr. Kneedler "I find that a very, a very disturbing argument . . . ."<sup>250</sup> Justice Alito's response to Mr. Kneedler's argument suggests that he disagrees with Mr. Kneedler's position, but this is the only instance in which the justices critique the petitioner's argument.

Conversely related to the experience of the petitioner's counsel, justices heavily ridicule and denigrate Mr. Mertz's arguments, at times, even laughing at his position. Following Mr. Mertz's opening statements, in which Mr. Mertz claims "this case is about free speech. This is not a case about drugs," Chief Justice Roberts sets the tone for

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<sup>248</sup> *Id.* at 40.

<sup>249</sup> *Id.* at 50.

<sup>250</sup> *Id.* at 20.

Mr. Mertz's oral arguments stating "It's a case about money. Your client wants money from the principal personally for her actions in this case."<sup>251</sup> Chief Justice Roberts aggressively reframes Mr. Mertz's argument in an adversarial manner suggesting Frederick's true motivation is greed. Of further consequence to Chief Justice Roberts is a personal concern that "principals and teachers around the country have to fear that they're going to have to pay out of their personal pocket whenever they take actions pursuant to established board policies."<sup>252</sup> Chief Justice Robert's comments immediately frame Mr. Mertz's argument in an unfavorable light, by which Mr. Mertz must now defend his client's position from the greedy and socially dangerous argument Roberts advanced. Chief Justice Roberts forces respondent's counsel into a defensive position before he can even begin to articulate his opening arguments. Chief Justice Roberts clearly takes exception to Mr. Mertz's case and appears to approach the case with a clear interactional bias against respondent's counsel. While Chief Justice Robert's questioning is obviously value laden, his approach seems tame to Justice Scalia's approach. Justice Scalia aggressively questions Mr. Mertz, at times preventing him from responding:

Justice Scalia: Nonviolent crimes are okay, it's only violent crimes that you can't, you cannot promote, right? Right?

Mr. Mertz: I think there is a—

Justice Scalia: "Extortion is Profitable," that's okay?

Mr. Mertz: Well—

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<sup>251</sup> *Id.* at 29.

<sup>252</sup> *Id.* at 30.

Justice Scalia: This is a very, very, with all due respect, ridiculous line. . . .<sup>253</sup>

To claim “with all due respect” and then state Mr. Mertz is advancing a “ridiculous line,” Justice Scalia’s sarcasm demeans Mr. Mertz. Justice Scalia not only aggressively challenges Mr. Mertz to relent to his position by repeating “right? Right?,” but he prevents Mr. Mertz from clarifying or defending his position by not allowing him to respond and dismissing his argument as a “ridiculous line.”

Later Justice Scalia joins in laughter prompted by a sarcastic statement made by Justice Kennedy, and then perpetuates the laughter by stating “because you’re both a truant and a disrupter, you get off. (laughter)./ Had you just been a disrupter, tough luck. (laughter).”<sup>254</sup> Justice Scalia’s sarcastic comments denigrate and ridicule Mr. Mertz’s position, and Justice Scalia’s comments, more than 28 of them, seem to substantially undermine Mr. Mertz’s ability to generate a successful argument, or even advance a reasonable position. Justice Scalia’s rhetorical discursive interaction heavily reflects a clear communicative and likely judicial bias against respondent’s counsel. His comments account for almost a third of the justices’ comments, and he appears as an advocate of the petitioner, attacking and attempting to overturn Mr. Mertz’s position.

Chief Justice Roberts and Justice Scalia are not the only justices who engage in ridiculing Mr. Mertz’s position. The justices appear to encourage and play off of each other’s behavior. In one instance, Chief Justice Roberts asks a question in response to

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<sup>253</sup> *Id.* at 35.

<sup>254</sup> *Id.* at 53.

Mr. Mertz assertion that Principal Morse had working knowledge of free speech cases related to schools:

Chief Justice Roberts: And so it should be perfectly clear to her exactly what she could and couldn't do.

Mr. Mertz: Yes.

Justice Scalia: As it is to us right? (laughter)

Justice Souter: I mean, we have had a debate here for going on 50 minutes about what Tinker means, about the proper characterization of the behavior, the non-speech behavior. . . . We've been debating this in this courtroom for going on an hour, and it seems to me however, you come out, there is reasonable debate.<sup>255</sup>

Missing from oral argument transcripts is the tone of each justice. In audio files, all three justices adopt a sarcastic tone when questioning Mr. Mertz, which again undermines any reasonable response he could provide. Justice Scalia's laughter would only be appropriate in an environment of sarcastic questioning, and his laughter only further denigrates Mr. Mertz's position, rendering a compelling retort impossible.

Justice Kennedy joins the other justices in belittling Mr. Mertz's argument by framing his position in a ridiculous light:

So under your view, if the principal sees something wrong in the crowd across the street, had to come up and say now, how many of you here are truants . . . I can't discipline you because you're a truant, you can go ahead and throw the bottle (laughter).<sup>256</sup>

Justice Kennedy's hypothetical ridicules Mr. Mertz's line of questioning by arguing *ad absurdum*. This would clearly not be a position a litigant would adhere to, nor does it apply to a free speech case. Justice Kennedy's hypothetical seems to be designed to

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<sup>255</sup> *Id.* at 49.

<sup>256</sup> *Id.* at 52.

provoke laughter that would undermine Mr. Mertz's argument and eliminate his ability to provide a persuasive response.<sup>257</sup> In general, justices appear more engaged in attacking Mr. Mertz than listening to his arguments.

The justices rhetorical discursive interaction in oral arguments reveal distinct divisions between counsels, often supporting counsels or allowing them to pass unchallenged if they ended up voting for them, and attacking and ridiculing counsels whom they voted against. The frequent interaction by Chief Justice Roberts, Justice Scalia, Kennedy, and Breyer likely significantly hindered the respondent's ability to articulate their argument in a persuasive manner, or even explain information which may have been misunderstood by the justices. Justice Ginsburg never received an answer regarding the student's truancy and it could have had a real impact, possibly preventing Justice Kennedy from joining in Justice Scalia's disparagement. At the very least readers should agree that Chief Justice Roberts, and Justice Scalia did not approach this argument with fairness or equal consideration for both counsels in mind. In fact, the justices attacked respondent's counsel with an aggression seemingly designed to undermine his case, possibly in the hopes of winning a swing vote in Justice Kennedy. With Justice Kennedy joining in the ridicule of respondent's counsel, it seems as if a solid five justices will be voting against the respondent. It is not an uncommon tactic among justices in divisive cases to try and win the swing vote to their side. When

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<sup>257</sup> Justice Kennedy's participation in the ridicule of Mr. Mertz is also significant because of his swing vote position. The disparagement of Mr. Mertz by Chief Justice Roberts, and Justice Scalia, may have also encouraged Justice Kennedy to join in the game, potentially influencing his consideration of the case. At the very least, Justice Kennedy fails to fairly consider the case, and has likely impacted his own judgment by joining in the ridicule of a counselor.

reviewing the analysis, it appears difficult to understand how respondent's counsel would have had the opportunity to persuade any swing justice with the limited time he was given.

In responding to the research questions, Chief Justice Roberts, and Justices Scalia, Breyer, Souter, and Stevens reveal a significant preference for one counsel over another in their challenging of counsels, allowing counsels an equal opportunity to respond, frequency at which they interrupt counsels, assistance of counsel's arguments, and general treatment of counsels. The disparity, in which justices treated counsels, at the very least, points to a bias in rhetorical discursive interaction and an inherent unfairness in the proceeding. Interactional bias does not necessarily mean there was judicial bias, although for some justices it seems a reasonable explanation. The justices' interactional bias raises concerns regarding the Court's ability to impartially evaluate both arguments. For those active justices, Sensemaking suggests that their judgment could be impaired because of frequent participation in the rejection or attack of an argument, or the occasional support of a counsel which may confirm their a priori commitments. Active justices may have also prevented less active justices from resolving essential questions or problems. At both the individual and group level active justices may have created an environment which skewed justices' ability to impartially consider the case. Readers would probably agree that Americans should expect more from the nation's highest court, at the very least we should be able to expect fairness and measured inquiry.

Because a clear bias was present in some justices' rhetorical discursive interaction, Sensemaking seems a more appropriate model for understanding justices' biased interaction, rather than the more popular strategic actor model. The analysis in this case reveals that rather than gathering information from both sides to seek the best possible solution, some justices sought to eliminate arguments that opposed their seemingly preferred position. In the scholarly realm of political scientists and communication scholars, biased rhetorical discursive interaction dramatically alters how prior models have explained the ways in which justices should act. The strategic actor is the primary model for considering Supreme Court interaction both in oral argument and outside of it. Closely related to the rational actor, under the strategic actor model, justices should gather as much information as possible in order to find the best possible solution in accordance with their preferences. The strategic actor model suggests a relatively even process of information gathering to reach the best possible decision; however, biased rhetorical discursive interaction offers an alternative understanding that opposes the strategic actor model, informing a new dimension of justices' communication.<sup>258</sup>

As this paper has revealed, some justices did attack counselors who opposed their commitments, and they also supported the counselor with whom their commitments most nearly aligned. The justices' interactional bias may have resulted from commitments developed through counsels' briefs, *amicus curiae* briefs, or previous

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<sup>258</sup> As stated above, not all justices demonstrate a communicative bias in their rhetorical discourse, and for those justices who do not demonstrate a communicative bias, perhaps the strategic actor is a reasonable explanation for these moderate justices. But those justices who act strategically may still be hindered in their ability to gather information by communicatively biased justices.

historically shaped views concerning the issues. Already familiar with the case's arguments, justices likely entered oral argument with preconceptions and prejudgments of how they would rule in the case. Chief Justice Roberts and Justices Scalia, Breyer, Souter, and Stevens all seemed to have a judgment in mind. Holding a priori commitments opposes the strategic actor model which suggests justices should either attempt to set aside personal commitments to evaluate arguments equally and enter oral argument with the desire to test all possibilities, or the strategic justice may have a tentative judgment in mind to test the proposition upon both counsels. Justice Ginsburg appeared to act in a balanced fashion and more closely reflected the strategic actor rather than the sensemaker in her exploration of issues. Chief Justice Roberts, and Justice Scalia appear as sensemakers by seeking support for a priori commitments and assisting preferred counsels. In addition Chief Justice Roberts and Justice Scalia attacked the counsel who opposed the justices' commitments potentially as a means of limiting equivocality. These two justices were joined by Justices Breyer, Souter and Stevens, but the latter three justices did not attack opposing counsels at a similar same rate as Chief Justice Roberts and Justice Scalia. Chief Justice Roberts, and Justice Scalia also heavily championed the counsel who supported their preferred position. The danger of this biased interaction lies in speech's cognitive affect. "Once a justification begins to form," in a justice's mind "it exerts effects on subsequent action," that can impair justices' ability to impartially evaluate a case.<sup>259</sup> Instead of using oral argument as a place to test arguments for the best possible choice that agrees with personal

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<sup>259</sup>*Id.* at 23.



commitments, justices used oral arguments in this case to reinforce commitments and convince themselves of the validity of their position. Biased rhetorical discursive interaction in oral argument tempers and strengthens justices' convictions; their commitments and interactions have "created a self-fulfilling prophecy that builds confidence in the prophecy."<sup>260</sup> "Both the justification and the action mutually strengthen one another" so that, in this oral argument, justices reaffirmed principles as well as the judgment they were already considering, through biased interaction.<sup>261</sup>

Justices' rhetorical discursive interactions likely played a significant role in the development of their understanding about the case. After oral argument in *Morse v. Frederick*, Justices Scalia and Breyer, Souter, Stevens and Chief Justice Roberts most likely left the courtroom with a firm conviction for which side they would vote. It is probable that they entered the courtroom with a view of how they would vote, but their rhetorical discursive interaction may have further entrenched and probably solidified the counsel for whom they would vote. The justices' rhetorical discursive interaction exhausted a substantial amount of time, possibly interfering with other justices' ability to resolve questions or issues. Regardless of the reasoning behind their behavior, the active justices in this case clearly impacted how other justices were able to gather information and weigh arguments.

Traditionally, we understand justices to determine the law, "not according to his own private judgment, but according to the known laws and customs of the land;" "the

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<sup>260</sup> *Id.* at 28.

<sup>261</sup> *Id.* at 28.

judges' techniques were socially neutral, his private views irrelevant; judging was more like finding than making."<sup>262</sup> However, instead of approaching a case with objective and socially neutral views, it seems more reasonable that justices already have a personal position regarding legal and social issues. Their age and experience have exposed the justices to a diversity of arguments from which they have been able to shape and temper their view of the world. Justices likely approach oral argument with both their historical bias in tow as well as their bias regarding the case at hand, relying on their bias or commitments to make sense of the case before them. Sensemaking offers not only an alternative perspective of judicial decision making that foregrounds communication, but it also offers a more potentially realistic approach to evaluating the way humans solve problems.

### **Conclusion**

This chapter provided a context for readers to understand the multiple purpose informing the environment of oral argument and grasping the unique interactional styles of individual justices. After establishing a context for readers, I analyzed the oral arguments in *Morse v. Frederick* using the theories, critical areas, and methods proposed in chapter III. Methods developed from the three critical areas worked in conjunction rather well to reveal justices rhetorical discursive bias in their interactions. Analysis with methods also exposed the limited utility of the strategic actor model and bolstered support for the integration of Sensemaking as a model of judicial decision making. The majority of justices appeared to enter oral argument with clear commitments and

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<sup>262</sup> Segal and Spaeth 2002, *supra* n. 8 at 87.

preferences for a particular side. Justices sought confirmation of personal commitments by supporting counsels who expressed a preferred policy and opposing counsels who offered arguments that challenged justices' commitments. By supporting preferred arguments and attacking challenging counsels, justices largely reinforced, validated, and entrenched initial commitments, endangering their ability to impartially weigh information and fairly consider both sides.

This chapter legitimated sensemaking as a potentially useful theory to apply in understanding rhetorical discursive interaction in oral arguments, and in turn foregrounded the importance of judicial interaction in the Court's oral arguments. Chapter V includes a more extensive analysis of another case: *Kennedy v. Louisiana*. I witnessed the argument for *Kennedy v. Louisiana* first hand, and offer exploration of the justices' reactions to issues regarding the death penalty for the rape of a child.

## CHAPTER V

### *KENNEDY V. LOUISIANA*

#### A FIRSTHAND OBSERVATION

The prior chapter served to examine the validity of using Sensemaking as a model to explain the justices' rhetorical discursive behavior in oral arguments. In detailing the justices' behavior, the strategic actor failed to account for a number of the justices' actions and Sensemaking offered a more reasonable explanation. To further challenge the potential applicability of Sensemaking, I observed firsthand the oral arguments in *Kennedy v. Louisiana* to determine again whether the justices' rhetorical discursive behavior may have reflected Sensemaking. This chapter considers whether firsthand observation may lend additional details that can assist in accounting for sensemaking, and it also provides a case where mixed methods excel if one approach does not accurately capture the justices' interactions.

*Kennedy v. Louisiana* 07-343 stood before the Supreme Court in 2008 for consideration of whether or not the death penalty may be applied to criminals convicted of a raping a child. Louisiana state law allowed for prisoners convicted of child rape to be sentenced to death. Like most Supreme Court cases, *Kennedy v. Louisiana* raised a number of complicated issues with which the justices were forced to struggle, and provides a case where equivocality spans widely across a number of issues. In regards to precedent regarding the death penalty, the Court decided in 1977 by a 7-2 vote that "the death penalty is cruel and unusual punishment for the rape of an adult woman," in

*Coker v. Georgia*.<sup>263</sup> However, *Coker* is limited to the rape of an adult woman, and the justices had to consider whether the rape of a child constitutes a new category to which the death penalty should apply based upon “evolving standards of decency that mark the progress of a maturing society,” previously established by *Atkins v. Virginia* in 2002.<sup>264</sup> The precedents grant justices the freedom to determine if states’ laws proscribing the death penalty for child rape constitute a trend of evolving standards, or if the death penalty should be reserved only for crimes of murder, or if states should be permitted to attempt to establish a trend. Texas Solicitor General Ted Cruz has suggested that states’ evolving decency standards reflect “the appreciation that society has for the enormous trauma and the enormous harm that child rape produces. That’s why there has been a consistent trend among the states toward increasing punishment for child sexual assault.”<sup>265</sup>

In addition to the legal precedents, the justices must also struggle with the concerns of child advocacy groups who argue that applying the death penalty for child rape may actually further endanger children rather than offering protection to them. Victoria Camp of the Texas Association Against Sexual Assault points out that Justice Department statistics reveal “more than 90 percent of child assault victims were abused by a family member or close family friend.”<sup>266</sup> By permitting the death penalty for child rape, Camp argues “‘It’s too hard for a child to have to testify against ‘Uncle John’ when

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<sup>263</sup> *Coker v. Georgia*, 433 U.S.\_\_(1977),

<sup>264</sup> *Atkins v. Virginia*, 536 U.S.\_\_(2002).

<sup>265</sup> Nina Totenberg, “Justices Weigh Death Penalty for Child Rape,” *www.NPR.org* 4/16/08, p.2.

<sup>266</sup> Dennis Powell, “Supreme Court to Hear Child Rape Case,” *www.abcnews.com*, 1/4/07 p.1.

they know he may be put to death.”<sup>267</sup> Children also prove vulnerable to questioning by police and often fall victim to police coercion in order to escape an uncomfortable environment, or gain the approval of an authority figure.

Finally justices must determine the facts of the case, and whether or not the current Louisiana state law functions effectively, or is largely used by prosecutors as a coercive tactic. The facts of the case present a troubling picture to distill a clear picture of the prisoner’s guilt or innocence, particularly when the prisoner has maintained his innocence for the crime. The case resulted from a violent sexual assault on an eight year old girl in 1998. Patrick Kennedy, the eight year old’s stepfather, called 911 to report the rape stating ““She was off in the yard and she said two boys grabbed her and raped my child.””<sup>268</sup> Kennedy’s stepdaughter initially told police “she was sorting Girl Scout cookies in the garage when she was assaulted by two boys.”<sup>269</sup> She later elaborated to a psychologist that the boys “dragged her over to the side yard, and as she put it, one of them put his ‘thing’ in her ‘pee pee.’”<sup>270</sup> After 20 months elapsed, state social workers suggested to the mother that “the child’s return would depend on her facing up to the stepfather’s role. The child then changed her story,” stating ““I woke up one morning and he was on top of me” when prompted for specifics the child murmured “he just raped me.””<sup>271</sup> While the child’s later testimony implicates the stepfather, no DNA

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<sup>267</sup> Dennis Powell, “Supreme Court to Hear Child Rape Case,” [www.abcnews.com](http://www.abcnews.com), 1/4/07 p.1.

<sup>268</sup> Nina Totenberg, “Justices Weigh Death Penalty for Child Rape,” [www.NPR.org](http://www.NPR.org) 4/16/08, p.2.

<sup>269</sup> Associated Press, “Court Mulls Death Penalty for Child Rape,” [www.usatoday.com](http://www.usatoday.com), 1/4/08, p.2.

<sup>270</sup> Nina Totenberg, “Justices Weigh Death Penalty for Child Rape,” [www.NPR.org](http://www.NPR.org) 4/16/08, p.2.

<sup>271</sup> Nina Totenberg, “Justices Weigh Death Penalty for Child Rape,” [www.NPR.org](http://www.NPR.org) 4/16/08, p.2.

evidence or physical evidence links the stepfather to the crime, and where the truth lies is unclear. No clear picture develops from the facts and testimony involved in the case, and a much murkier understanding results when involving the previous legal precedent, and social repercussions of child rape laws.

In order to resolve this case, the Supreme Court is faced with a variety of reasonable options that may result in serious social repercussions. As Dahlia Lithwick summarizes:

the problem with measuring ‘evolving standards of decency’ is that they tend to evolve and devolve in numerous directions at the same time. Kennedy’s lawyers are right about the broad U.S. distaste for executing non-murderers. But Louisiana is also right that the trend is shifting toward extending the types of crimes eligible for the death penalty. . . .For the high court, it’s a challenge: distilling all these trends and countertrends into some broad constitutional rule—for a public that increasingly seems to like the idea of capital punishment more than the reality of it.<sup>272</sup>

Reflecting Max Weber’s understanding of multiple rationalities, the Court’s oral argument must explore the tensions and struggles involved in the complex social web woven throughout this case. Because multiple rationalities and serious social repercussions may result from their ruling, this case provides a great opportunity for evaluating justices’ rhetorical discursive interaction. It would seem that high profile cases would require stringent and balanced consideration and evaluation by justices under the strategic actor model. Studying the justices’ discursive interactions may reveal how carefully they are considering arguments, and at the very least it should reveal

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<sup>272</sup> Dahlia Lithwick, “The Supreme Penalty for Rape,” *www.Newsweek.com* 4/21/08, p.2.

whether justices approach this case with an unbiased and fair consideration of arguments by both parties.

On the day of oral argument for *Kennedy v. Louisiana*, the Court made an unusual and seemingly strategic announcement of a previous case, *Baze and Bowling v. Rees*.<sup>273</sup> Chief Justice Roberts read the Court's 7-2 opinion supporting Kentucky's use of lethal injection for capital punishment. Robert's announcement shifts the rhetorical ground of the day's oral argument. Initially the counsel for Patrick Kennedy, Jeff Fisher, seems "to have the better argument" since "national consensus has recently been to limit rather than expand the death penalty; no one has been executed for rape since 1964."<sup>274</sup> Robert's announcement of a 7-2 decision introduces a new sense of doubt about the Court's consideration of the death penalty, immediately placing Jeff Fisher into a difficult and unforeseen rhetorical environment of uncertainty concerning a speaker's audience. The optimism for death penalty opponents vanished as the Court's words propelled the executions of nearly a dozen stayed executions.

In summarizing the Court's oral argument for the day, the justices' rhetorical discursive interaction was vigorous, ranging from inquiries about Louisiana's state law, to pushing for a description of heinous child rape. Lawyers from both parties were challenged heavily by the justices with some justices playing obvious favorites in their treatment of counsels. In particular, Justice Scalia was aggressive in his questioning of

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<sup>273</sup> *Baze and Bowling v. Rees* 553 U.S.\_\_(2008)

<sup>274</sup> Dahlia Lithwick, "The Supreme Penalty for Rape," *www.Newsweek.com* 4/21/08, p.2.



petitioner's counsel and at times plainly rude. Chief Justice Roberts also heavily engaged petitioner's counsel in a one sided theory game, but remained respectful. The justices' arguments were so vigorous, at times, that active justices prevented other justices from asking questions to counsels. Occasionally oral arguments may reveal a case's potential turnout, but this oral argument was uncertain in its outcome, perhaps because the Court's decision largely rested with Justice Kennedy as a swing vote, and his participation proved minimal.

During the following analysis, readers should keep in mind justices' final votes for this case. Justices' interactions may reveal how they intend to vote, although this would oppose the strategic actor model. *Kennedy v. Louisiana* resulted in a 5-4 vote with Justice Kennedy writing the majority opinion with whom Justices Stevens, Souter, Ginsburg, and Breyer joined; Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito.

### **Rhetorical Discursive Interaction in *Kennedy v. Louisiana***

Table 5. 1 lists the number of interruptions generated from both transcript and audio file.<sup>275</sup>

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<sup>275</sup> In table 5.1 interruptions are listed for each justice during each counsel's oral argument time. The petitioner's tallies include rebuttal.

Table 5.1 *Interruptions*

|                   | Scalia | Roberts | Alito | Thomas | Kennedy | Breyer | Souter | Ginsburg | Stevens | Total |
|-------------------|--------|---------|-------|--------|---------|--------|--------|----------|---------|-------|
| <b>Petitioner</b> | 18     | 10      | 2     | 0      | 3       | 0      | 3      | 6        | 0       | 39    |
| <b>Respondent</b> | 6      | 1       | 0     | 0      | 2       | 10     | 3      | 1        | 4       | 27    |

When comparing the number of interruptions, it becomes clear petitioner's counsel experienced significantly more interruptions than the respondent's counsel, a significant disadvantage of over 30%.<sup>276</sup> Rhetorically, interruptions prevent cohesive messages that mitigate influence and may diminish justices' ability to understand an argument or explanation. During petitioner's oral argument Justice Scalia was most active in interrupting the advocate while Chief Justice Roberts also frequently interrupted the argument. These two justices did not engage in the same number of interruptions during respondent's oral argument, only interrupting respondent's counsel seven times compared to the 28 interruptions during petitioner's time. Similarly, Justice Breyer interrupted respondent ten times without once interrupting petitioner. Justice Ginsburg and Stevens may have also interrupted disproportionately but with minor differences between counsels. Although it may be unclear why the justices interrupted at differing levels between petitioner and respondent's counsels, it is interesting to note

<sup>276</sup> One means of beginning to learn about justices' rhetorical discursive interaction is through their interruptions of counsel. Interruptions provide a basic means of understanding how justices controlled oral arguments for both parties. If one lawyer suffered significantly less interruptions than the competing lawyer, then it seems likely that some justices may be reflecting a preference in their questioning and gathering of information. Mapping individual justice's interruptions may also reveal whether a justice disproportionately interrupted a counsel, suggesting a potential hostility towards a particular position.

the significant interactional differences and the manner in which they directed their attention toward particular counsels. A consideration of the justices' statements will help further explain the justices' intentions behind their interruptions.

Table 5.2 lists the number of challenging (C/), assisting (A/), or neutral (N/) statements or questions posed to each counsel by the justices.<sup>277</sup>

Table 5.2 *Statements*

|                | Scalia    | Roberts   | Alito    | Thomas   | Kennedy  | Breyer    | Souter   | Ginsburg | Stevens  |
|----------------|-----------|-----------|----------|----------|----------|-----------|----------|----------|----------|
| <b>C/pet.</b>  | <b>16</b> | <b>11</b> | <b>2</b> | <b>0</b> | <b>4</b> | <b>0</b>  | <b>0</b> | <b>6</b> | <b>0</b> |
| <b>A/pet.</b>  | <b>0</b>  | <b>0</b>  | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b>  | <b>1</b> | <b>1</b> | <b>0</b> |
| <b>N/pet.</b>  | <b>2</b>  | <b>0</b>  | <b>0</b> | <b>0</b> | <b>2</b> | <b>0</b>  | <b>2</b> | <b>0</b> | <b>0</b> |
| <b>Total</b>   | <b>18</b> | <b>11</b> | <b>2</b> | <b>0</b> | <b>6</b> | <b>0</b>  | <b>3</b> | <b>7</b> | <b>0</b> |
| <b>C/resp.</b> | <b>3</b>  | <b>0</b>  | <b>0</b> | <b>0</b> | <b>2</b> | <b>10</b> | <b>4</b> | <b>0</b> | <b>5</b> |
| <b>A/resp.</b> | <b>6</b>  | <b>1</b>  | <b>0</b> | <b>0</b> | <b>0</b> | <b>0</b>  | <b>0</b> | <b>0</b> | <b>0</b> |
| <b>N/resp.</b> | <b>0</b>  | <b>0</b>  | <b>0</b> | <b>0</b> | <b>3</b> | <b>5</b>  | <b>2</b> | <b>1</b> | <b>2</b> |
| <b>Total</b>   | <b>9</b>  | <b>1</b>  | <b>0</b> | <b>0</b> | <b>5</b> | <b>15</b> | <b>6</b> | <b>1</b> | <b>7</b> |

Table 5.2 provides a better understanding of the justices' rhetorical discursive interaction because it reveals the purpose or consequence their statements may have had

<sup>277</sup> Justices' statements were coded in relationship to the counsel who was arguing. In understand that statements may be both challenging to one position and assisting towards another, but my concern lies in understanding how a justice's statement may influence the rhetorical or discursive ability of a lawyer to advance their argument.

upon the argument.<sup>278</sup> Justice Scalia and Chief Justice Roberts heavily challenge the petitioner during his argument, making 29 of the total 47 statements uttered, or comprising 61 % of the spoken statements. While Justice Scalia and Chief Justice Roberts heavily challenged petitioner, Justice Breyer more stringently tested respondent's arguments. Justice Stevens also engaged more often with respondent's counsel, but his interaction pales in comparison to those of Justices Scalia, Breyer, and Chief Justice Roberts. Generally, justices assisted counsels less often than they challenged them, but Justice Scalia assisted respondent six times. When comparing the rhetorical discursive interaction of the justices, Justice Scalia appears to have provided preferential treatment to respondent's counsel, while heavily challenging petitioner. Similarly Chief Justice Roberts frequently challenged petitioner without even once challenging respondent. Justice Ginsburg was also guilty of challenging petitioner, without equally challenging the respondent, but a handful of her statements were required to reassert her argument as other justices were interrupting her line of questioning. This forced Justice Ginsburg to reiterate the same challenging line of argument in order to get a clear response from petitioner. The more active justices in petitioner's argument were more likely to blame for her repeated questioning than any undue attention.

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<sup>278</sup> The statements a justice makes allows us to better understand the purpose of their interruptions, but it also provides a means of learning how justices may have challenged or supported each counsel. In the coding of challenging, assisting, or neutral statements, I gauged challenging statements by justices as those which forced counsels to defend a position, or may have revealed a weakness in their argument. Justices' assisting statements typically highlight strengths in a counsel's argument, or rescue a counsel from another justice's line of questioning. Neutral statements by justices were factual or record related questions which were of little consequence to the counsel's argument.

In conjunction with Table 5.1, the data reveal a clearer picture of rhetorical discursive interaction and suggest that the justices' behavior may reveal biased interactions. Chief Justice Roberts, and Justices Scalia and Breyer were heavily engaged in challenging one counsel without similarly challenging the other. Justices Scalia also aided one counsel and overlooked similar assistance with the opposing counsel. The direction and type of rhetorical discursive interaction accords with the justices' final votes. Chief Justice Roberts and Justice Scalia voted against petitioner, while Justices Breyer voted in favor. Tables 5.1 and 5.2 point to the presence of rhetorical discursive bias in justice's interactions, but how much actual time do the justices' control versus the lawyers?

Table 5.3 displays petitioner's oral argument including rebuttal time. Total speaking time 30 minutes 46 seconds. Table 5.3 also displays respondent's oral argument. Total speaking time 30 minutes 16 seconds.

Table 5.3 *Speaking Time*

|              |  | <u>Petitioner</u>                          |        |         |        |        |   |        |        |          |         |    |
|--------------|--|--|--------|---------|--------|--------|---|--------|--------|----------|---------|----|
|              |  | <i>Fisher</i>                              | Scalia | Roberts | Alito  | Thomas | Kennedy                                       | Breyer | Souter | Ginsburg | Stevens |    |
| Seconds      |  | 1025                                       | 251    | 299     | 29     | 0      | 63  | 0      | 39     | 215      | 0       |    |
| <b>Total</b> |  | <b>Pet. = 1025 (17 minutes 5 seconds)</b>  |        |         |        |        | <b>Justices = 896 (16 minutes 56 seconds)</b> |        |        |          |         |    |
|              |  | <u>Respondent</u>                          |        |         |        |        |   |        |        |          |         |    |
|              |  | <i>Clark Cruz</i>                          | Scalia | Roberts | Thomas | Alito  | Kennedy                                       | Breyer | Souter | Ginsburg | Stevens |    |
| Seconds      |  | 467  | 525    | 100     | 15     | 0      | 0   | 80     | 295    | 310      | 25      | 90 |
| <b>Total</b> |  | <b>Resp. = 992 (16 minutes 32 seconds)</b> |        |         |        |        | <b>Justices = 915 (15 minutes 15 seconds)</b> |        |        |          |         |    |

A comparison between petitioner and respondent's speaking time reveals that counsels were given relatively equal speaking times, but when dividing up the speaking time according to the justices' final votes, a more disproportionate picture develops. Chief Justice Roberts and Justice Scalia accounted for nearly 62%, or over nine minutes, of the justices' speaking time during petitioner's oral argument. Similarly, Justices Kennedy, Breyer, Souter, Ginsburg, and Stevens spent over 65%, or more than 13 minutes, of the justices' speaking time during respondent's oral argument. Conversely, the same justices only used 35% of the time in petitioner's oral argument, and Chief Justice Roberts and Justice Scalia took up less than 13% of the justices' time in respondent's argument.

Justices again appear to be reflecting biased sensemaking behavior, as they did in *Morse v. Frederick*, by engaging the advocate with whom they will eventually vote against. Justice Scalia appears guilty of this championing behavior as he assisted the

respondent six times in making their argument, and attacked the petitioner 16 times. Chief Justice Roberts follows a similar pattern of interaction. Although he did not assist the respondent's lawyers but once, he did not challenge them either. Justice Breyer heavily challenged respondent without once speaking during petitioner's argument. The justices exert a significant amount of control over oral argument, and it is interesting to note that out of a 30 minute oral argument, counsels only spoke in between 16-17 minutes, and determining the limited time frames justices provided advocates also informs the hindrances the advocates faced.

Table 5.4 displays the number of speaking instances in which lawyers were able to speak for a certain timeframe.

Table 5.4 *Lawyers' Speaking Timeframes*

| <b>Seconds</b>    | <b>1-10</b> | <b>11-20</b> | <b>21-30</b> | <b>31-40</b> | <b>41-50</b> | <b>51-60</b> | <b>61+</b> |
|-------------------|-------------|--------------|--------------|--------------|--------------|--------------|------------|
| <b>Petitioner</b> | <b>21</b>   | <b>8</b>     | <b>6</b>     | <b>2</b>     | <b>3</b>     | <b>4</b>     | <b>3</b>   |
| <b>Respondent</b> | <b>19</b>   | <b>7</b>     | <b>4</b>     | <b>7</b>     | <b>0</b>     | <b>0</b>     | <b>4</b>   |

In this case, speaking time frames were relatively equal, though not captured in the table are the length of Mr. Cruz's 60+ speaking time frame. It is unusual to provide lawyers with lengthy speaking time frames and even more unusual that the justices allowed four lengthy time frames of 120, 147, 84, and 74 seconds. Mr. Fisher was kept close to the 60 minute mark with one retort lasting 90 seconds. It seems unlikely that

either counsel held a distinct persuasive or communicative advantage based on an analysis of the speaking frames.

A summary of quantitative findings suggest that some justices' rhetorical discursive interactions were directed disproportionately towards one counsel or another, revealing a potential preference for one counsel, or at the very least exposing unequal treatment of counsels by individual justices. Petitioner's counsel suffered more interruptions than respondent's counsel by Chief Justice Roberts and Justice Scalia. Likewise, Justice Breyer interrupted respondent's counsel dramatically more than petitioner. Chief Justice Roberts and Justice Scalia vigorously challenged petitioner and Justice Scalia even repeatedly assisted the respondent without ever aiding petitioner. Speaking time frames revealed that justices who largely dominated the oral argument of a particular advocate ended up voting against that party. In general, quantitative data suggest potential sensemaking behavior through a bias rhetorical discursive interaction for some justices and may reveal a preferential treatment for counsels. Qualitative data provides further clarification of the justices' initial sensemaking behavior.

### **Qualitative Findings**

From first-hand observations, justices' interaction in *Kennedy v. Louisiana* prevented other less active justices from asking questions. Justice Scalia's rhetorical discursive interaction prevented Justice Stevens from asking questions multiple times. Justice Stevens would lean forward to turn on his microphone and before he could ask a question, Justice Scalia had already begun making further remarks. In another instance, Chief Justice Roberts prevented Justice Souter from asking a question to respondent's



counsel by ending counsel's argument time. These small interactional cues can have dramatic consequences, and do not reflect balanced consideration of the issues, but instead suggest that aggressive rhetorical discursive interaction may actually be harming justices' ability to consider a case, particularly if they cannot get their questions answered.

During petitioner's oral argument, Chief Justice Roberts and Justice Scalia were the most active of the justices in challenging petitioner's arguments. Yet while Chief Justice Roberts was respectful in his opposition, Justice Scalia heavily ridiculed and denigrated counsel's arguments, drawing laughter from the crowd in at least three separate moments. Petitioner's counsel did find respite in assistance from Justice Souter and Justice Ginsburg, but Justice Scalia's aggressive rhetorical onslaught was glaringly obvious in the courtroom.

Justice Scalia places petitioner's counsel, Jeff Fisher, immediately on the spot when he interrupts Mr. Fisher's opening remarks, challenging him to provide details as to how a sexual assault on a child might be considered "heinous."<sup>279</sup>

Justice Scalia: How would you describe a particularly heinous rape of a child under 12? What would make it particularly heinous?

Mr. Fisher: Well there could be several aggravating facts that would make a rape of a child or indeed of any person, a particularly egregious crime, but in *Coker* against Georgia, this Court did not simply hold that the Eighth Amendment prohibited imposing the death penalty for the crime of rape; it held that this Court - - that the Eighth Amendment prohibited imposing the death penalty for rape with aggravating circumstances.

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<sup>279</sup> 07-343 *Kennedy v. Louisiana*, 4.

Remember in *Coker* against Georgia, there were two aggravating circumstances in that case. First the offender was a recidivist. He had been convicted of rape three times, was a convicted murderer who had escaped from prison.. Second, he committed the rape in the course of committing other very serious felonies, including kidnapping and robbery.

And so at the very minimum, the State stands here with the burden today to say that an average child rape is worse than the crime in *Coker*, that this Court held was not sufficiently superior - -

Justice Scalia: Suppose - - suppose the State says that all recidivist rapists of children under 12 will - - will suffer the death penalty. Does it have to narrow that class further? I mean, the need for narrowing depends upon how narrow the class is described in the first place. Right?

Mr. Fisher: If - -

Justice Scalia: I mean, if the law says you have to be a recidivist, you have to have all the other factors that you mentioned, if - - if the law said that, would you come in and say “Oh no, you can’t - - you can’t just give everybody who commits that crime the death penalty”? You have to narrow the class.<sup>280</sup>

Justice Scalia’s opening question regarding places Mr. Fisher in an extremely uncomfortable and difficult rhetorical situation. The Courtroom is not typically the venue where graphic details are discussed, and Mr. Fisher must offer a response that eschews graphic details but yet responds to Justice Scalia’s challenge. Justice Scalia’s question also puts Mr. Fisher in a disadvantageous position before he is able to fully articulate his primary arguments. After less than a minute, Justice Scalia disrupts Mr. Fisher’s ability to present the first key arguments, signaling the rest of the Court’s justices to begin their questioning, and hindering Mr. Fisher’s ability to finish his opening arguments and establish a foundation for his arguments.

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<sup>280</sup> 07-343 *Kennedy v. Louisiana*, 4-5.

Minutes after his first challenging questions, Justice Scalia continues his aggressive attack of Mr. Fisher's arguments when he disagrees with how Mr. Fisher has constructed a controlling opinion out of a fractured majority.

Mr. Fisher: Well, my understanding of this Court's Marks rule is that the narrowest opinion that commands a majority - - so Justice Powell's opinion was actually a seventh vote. If you count the two justices on this Court who held the death penalty was unconstitutional across the board and add the four that constituted the plurality in *Coker*, we think the plurality opinion becomes - -

Justice Scalia: That's a - -

Mr. Fisher: - - the controlling one.

Justice Scalia: That's a strange way of making a majority, isn't it? (Laughter). Two people who think even the death penalty for murder is no good, they're going to form the majority of people who consider whether a lawful death penalty can be imposed for rape. I think at least in those circumstances, you have to discount the people who would not allow the death penalty under any circumstances for any crime.

Mr. Fisher: Well, I'm not aware of any wrinkle in this Court's jurisprudence that says that if a Justice is too far out of the mainstream that their vote is discounted-

Justice Scalia: He - - he is not considering the issue that is before the Court. The issue before the Court is whether - - whether a permissible death penalty can be imposed for this crime. These parties say there's no such thing as a permissible death penalty. I mean it would be - - if that wrinkle isn't there, we should iron it in pretty quickly. (Laughter).<sup>281</sup>

Justice Scalia remarks "that's a strange way making a majority, isn't it?," draws laughter from the audience, once again placing Mr. Fisher in an unenviable position as the butt of a justice's joke. When Mr. Fisher attempts to offer an explanation with a strange phrase "I'm not aware of any wrinkle in this Court's jurisprudence," Justice Scalia again

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<sup>281</sup> 07-343 *Kennedy v. Louisiana*, 8-9.

prompts laughter as he retorts “if that wrinkle isn’t there, we should iron it in pretty quickly.” Justice Scalia’s humor draws laughter from the entire audience and his humor creates a very difficult situation for Mr. Fisher to regain his composure and maintain the focus of his argument. In addition to drawing laughter, Justice Scalia also asserts that “he is not considering the issue that is before the Court,” suggesting that Mr. Fisher’s remarks do not address the case at hand. Justice Scalia’s comments and humorous use of language discredit and demonstrate a lack of respect for Mr. Fisher’s position. If Justice Scalia used the same disrespectful tactics and humorous chiding during the respondent’s argument, then perhaps his behavior would be considered equally disrespectful and thus balanced. But his denigrating humor and heavy-handed criticism was only directed at Mr. Fisher and he creates another difficult rhetorical situation because Mr. Fisher must regain the credibility which Justice Scalia disparaged, along with resetting the course of his argument.

Following Justice Scalia’s castigating humor and criticism, Justice Souter rescues Mr. Fisher by helping him reframe the argument:

Justice Souter: Even - - even with respect to - - now, I’m asking you to - -

Mr. Fisher: Right.

Justice Souter: - - to forget my question again for a minute.

Mr. Fisher: Okay. But - -

Justice Souter: Even - - even on the - - on the plurality analysis, your argument, as I understand it is, if there is any question left in Coker, in effect it’s answered by Edmund/Tilson.

Mr. Fisher: I think that's right, and it's also answered by simply the empirics across the country right now, if you did nothing more than applies the Roper and Atkins cases.

Justice Souter: Okay, but then that's a different reason.

Mr. Fisher: Yes.

Justices Scalia and Ginsburg had previously questioned the role of a majority opinion in Coker which Mr. Fisher suggested as a controlling precedent. Mr. Fisher was unable to satisfy the justices' inquiries and so Justice Souter resolves the justices' dispute suggesting "as I understand it, if there is any question left in Coker, in effect it's answered by Enmund/Tilson."<sup>282</sup> This provides the opportunity for Mr. Fisher to agree, "I think that's right," and then expand on his reasoning. Unfortunately Mr. Fisher does not get to provide a significant explanation before Chief Justice Roberts steps in, derailing Justice Souter's assistance, but Justice Souter's help may have provided Mr. Fisher with an argument that persuaded Justice Ginsburg.<sup>283</sup>

During Mr. Fisher's response to Chief Justice Roberts, Justice Scalia proceeds to criticize Mr. Fisher's argument by suggesting that Mr. Fisher's argument cuts against the case he has brought before the Court.

Chief Justice Roberts: Well, speaking of Roper and Atkins, is it - - does it only work in one way? How are you ever supposed to get consensus moving in the opposite direction? In other words, you look to the number of states under Roper and Atkins who impise it and you say, well, most of them are abolishing it, so we think it's unconstitutional, combined with other factors.

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<sup>282</sup> 07-343 *Kennedy v. Louisiana*, 10.

<sup>283</sup> Justice Scalia's early behavior indicates that he may be too entrenched to alter his preconceived notions.

Now if there's going to be a trend the other way, how does that happen? As soon as the first state says, well, we're going to impose the death penalty for child rape, you say, well, there isn't a consensus, so it's unconstitutional. I mean do 20 states have to get together and do it at the same time? Or how are they supposed to move the inquiry under Atkins and Roper in the opposite direction?

Mr. Fisher: Well, I think it's possible but this Court has understood - - I think well understood that it is a practical problem. It is one that gives this Court caution before ruling a law unconstitutional. Here I don't think - -

Justice Scalia: That's nice.

Mr. Fisher: - - you're going to need to gravel - -

Justice Scalia: I say that's nice. We're in effect prohibiting people from changing their mind.

Mr. Fisher: I don't - -

Justice Scalia: - - about what - - what justifies the death penalty.

Mr. Fisher: I don't think that's necessarily the case, Justice Scalia. And of course there are narrower ways to decide this case that could leave open the possibility of future developments.

But Justice - - Mr. Chief Justice, I want to answer your question and say I think there may be a misunderstanding that this Court really needs to address that in this case, because we have had, since 1995 when the State of Louisiana passed this law and the year after when the supreme court of Louisiana upheld it in a very widely covered opinion from which this Court denied certiorari, there has been a national debate for 12 or 13 years already as to the propriety of imposing the death - -

Chief Justice Roberts: And the trend - - the trend since 1995, '90, has been more and more States are passing statutes imposing the death penalty in situations that do not result in death.

Mr. Fisher: I think that's right. So you have to ask yourself the question whether that is enough. And if we - -

Justice Scalia: Didn't we say in - - in Atkins that it's the trend that counts; it's not the numbers.

Mr. Fisher: I think the Court said in Atkins - -

Justice Scalia: It's the trend - - you've heard the expression 'hoisted by your own petard.' The trend here is clearly in the direction of permitting more and more - - of more and more States permitting the capital punishment for this crime.

In this instance, Chief Justice Roberts has asked a question that poses a significant problem to Mr. Fisher's case, and Mr. Fisher requires a response that appropriately addresses Chief Justice Roberts' question because it is likely a question held by a number of the other justices. As Mr. Fisher attempts responding to Chief Justice Roberts' question, Justice Scalia interrupts his response by sarcastically dismissing it as he states "that's nice. I say that's nice. We're in effect prohibiting the people from changing their mind."<sup>284</sup> Justice Scalia's sarcastic tone dismisses the relevancy of Mr. Fisher's argument, instead of confronting the issue, and more importantly he prevents Mr. Fisher from addressing Chief Justice Roberts' question. Justice Scalia once again places Mr. Fisher in a defensive position in which Mr. Fisher must defend himself from the justice's criticism. Mr. Fisher attempts to return to addressing the Chief Justice, but before he can provide a satisfactory response, Justice Scalia offers his own judgment regarding the case. Stating "you've heard the expression 'hoisted by your own petard,'" Justice Scalia provides his early judgment in the case to suggest that Mr. Fisher's case may potentially be over based upon his own arguments cutting against the case. If Justice Scalia's earlier behavior were not enough to display bias, with this comment, Justice Scalia easily tips his hand and reveals his biased standing in the case, as he essentially declares the case to be over.

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<sup>284</sup> 07-343 *Kennedy v. Louisiana*, 11.

Following Justice Scalia's prejudgment in the case, his scathing sarcasm continues when Mr. Fisher again attempts to respond to the same topic from one of Chief Justice Roberts' questions.

Mr. Fisher: Well, a State could do something like what Georgia has done, which is pass a law that says that - - that the death penalty is permissible in a given crime - - in, for example, rape - - to the extent allowed by the United States Supreme Court, or to the extent allowed by the Eighth Amendment.

If several States pass laws like that, eventually this Court even - - let's say the Court decides this case in my favor today. Eventually this Court could take notice of that and take certiorari and again decide whether or not the Eighth Amendment was - -

Justice Scalia: They don't even have to say "to the extent allowed by the Supreme Court." They can pass a law that - - seems to contradict a prior opinion of ours; can't they?

Mr. Fisher: Of course.

Justice Scalia: Abraham Lincoln said they could, anyway (untranscribed laughter).

Justice Scalia frames one of Mr. Fisher's arguments in an absurd legal light as he describes that states "can pass a law that seems to contradict a prior opinion of ours; can't they. . . . Abraham Lincoln said they could, anyway."<sup>285</sup> Justice Scalia's comment once again draws laughter from the crowd and his comments suggest that Mr. Fisher lacks a historical and legal understanding of states' rights. Justice Scalia's sarcasm again damages Mr. Fisher's credibility and may negatively have influenced other justices' consideration of Mr. Fisher's arguments.

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<sup>285</sup> 07-343 *Kennedy v. Louisiana*, 14.



Justice Scalia does not only hinder Mr. Fisher's response to Chief Justice Roberts, but in three very significant opportunities for Mr. Fisher, Justice Scalia also disrupts Mr. Fisher's ability to respond to Justice Kennedy's questions. Justice Kennedy's questions provide Mr. Fisher with an opportune moment to address his particular concerns. Mr. Fisher's response to Justice Kennedy is so crucial because Justice Kennedy will likely be the swing vote for this case. As a death penalty case, many justices have staked out their positions prior to the case, but Justice Kennedy often stands in between the justices who frequently oppose and those justices who regularly support the death penalty. Because Mr. Fisher's case is a new test to the limits of the death penalty, Justice Kennedy's position is not well known. Justice Kennedy provides Mr. Fisher with the unique opportunity to respond to his questions and concerns as he tests Mr. Fisher's argument concerning the limits to the death penalty by asking "what about treason. . . . Even the countries of Europe which have joined the European Convention on human rights, I believe they make an exception to the prohibition of the death penalty for treason."<sup>286</sup> Before Mr. Fisher can finish his first sentence in response to Justice Kennedy, Justice Scalia launches a quick succession of leading questions that distract from Mr. Fisher's opportunity to respond to Justice Kennedy. Justice Scalia interrupts Mr. Fisher's retort:

Justice Scalia: Isn't there a Federal Treason Statute?

Mr. Fisher: Of course. There is a every reason to believe - -

Justice Scalia: And that doesn't require murder; does it?

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<sup>286</sup> 07-343 *Kennedy v. Louisiana*, 21.

Mr. Fisher: No it does not. It requires a - -

Justice Scalia: Do you think that's unconstitutional?

Mr. Fisher: No, your Honor. And I think if anyone thought that the treason laws were implicated here - -

Justice Scalia: Wow

Mr. Fisher: you might have different parties before the Court today.

Justice Scalia: Do you think treason is worse than child rape?<sup>287</sup>

And at this point during Mr. Fisher's response, Chief Justice Roberts steps in, further preventing Mr. Fisher from responding to Justice Kennedy. Justice Scalia's rhetorical discursive interaction is both hostile, aggressive, and significantly hinders Mr. Fisher's ability to respond to a key justice. Justice Scalia's interaction also prevents Mr. Fisher from responding to other justices who may have a similar concern as Justice Kennedy's. His actions disrupt the flow of information, hamper Mr. Fisher's ability to construct an argument towards Justice Kennedy's position, and displays preferential treatment towards one counsel because he does not behave in a similar fashion during respondent's argument.

In another instance, and perhaps the most crucial, Justice Kennedy asks Mr. Fisher a question before he steps down from the podium to preserve time for his rebuttal. This is Mr. Fisher's opportunity to again respond to one of Justice Kennedy's concerns, a rare opportunity for most advocates. It is often a moment in oral argument, that other justices refrain from interrupting an advocate's response because they want their

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<sup>287</sup> 07-343 *Kennedy v. Louisiana*, 21.

colleagues to have their questions resolved, and they may want to prevent wasting any of the advocate's time for rebuttal. Justice Kennedy interrupts Mr. Fisher's attempt to step down from the podium by asking:

Justice Kennedy: Mr. Fisher. Your white light is on, and you want to protect your rebuttal right, but you began by indicating that this statute could be narrowed. It could be narrowed by a requirement of recidivist behavior. Are there any other narrowing categories?

Mr. Fisher: Well, I think there are two ways to decide this case on more narrow grounds, perhaps this answers your question. First, this Court could say that Louisiana is the only State that doesn't require recidivism, so it fails the substantive Atkins-Roper analysis. It could also say that - - that Louisiana's law isn't sufficiently narrow. Yes, Justice Kennedy, I think if the question is could there be another particularly heinous circumstance that you, just in the context of narrowing would be enough, one might imagine other aggravating circumstances. The ones in Coker wouldn't be enough.

Justice Scalia: Well - -

Justice Kennedy: What would they be?

Mr. Fisher: One could imagine something like torture or extraordinarily serious harm in a case, something like that. But again, that would do nothing - -

Justice Scalia: How do you view recidivism? I mean, I assume even if you don't oppose the death penalty, you're going to get a good number of years, right? So you are going to be 40 years in person, come out and do it again? I don't think so.

Mr. Fisher: I'm not sure what the question is?

Justice Scalia: I mean, it is an unrealistic condition that you have raped a 12-year - - a child twice. The first time you do it and are convicted of it, you'll be sent up for long enough that you won't have the chance to do it a second time.

Mr. Fisher: I think that's right, Justice Scalia. Perhaps the States want to speak to that. They're the ones that put it in their law.<sup>288</sup>

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<sup>288</sup> 07-343 *Kennedy v. Louisiana*, 26-8.

Mr. Fisher begins by stating “Well I think there are two ways to decide this case on more narrow grounds,” and he is able to explain the first path, but before he is able to discuss a second path Justice Scalia interrupts his response.<sup>289</sup> In an attempt to reassert control Justice Kennedy asks again “What would they be,” and again before Mr. Fisher is able to finish his second sentence, Justice Scalia interrupts him, derailing the argument, terminating Mr. Fisher’s argument time, and preventing Mr. Fisher from addressing Justice Kennedy for a second time.<sup>290</sup> Not captured in the transcript is Justice Kennedy’s strain to speak over Justice Scalia in order to get his question resolved. Justice Scalia’s interaction prevents Justice Kennedy from getting his question answered and several seconds after making his last statement he concludes his argument to protect time for his rebuttal.

In the previous selection, Justice Scalia’s final comments provide an ideal example of how justices may use oral arguments to evaluate and work their way through positions. He advances a position which implicitly over turns the need for a death penalty by stating “it is an unrealistic condition that you have raped a 12-year - - a child twice. The first time you do it and are convicted of it, you’ll be sent up for long enough that you won’t have the chance to do it a second time.” His comment seems to reject the recidivism qualification Mr. Fisher earlier described, but the statement also calls into question the need for a death penalty. It is almost as if Justice Scalia has been “hoisted

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<sup>289</sup> 07-343 *Kennedy v. Louisiana*, 27.

<sup>290</sup> 07-343 *Kennedy v. Louisiana*, 27.

by his own petard.” However, in biased sensemaking fashion, he seems to reject his own insight for his personal preference.

In a third instance, Justice Kennedy challenges Mr. Fisher’s argument during his rebuttal time. Mr. Fisher is presented with the unusual opportunity to once again address Justice Kennedy.<sup>291</sup>

Justice Kennedy: I don’t understand - - is that in front of us here?

Mr. Fisher: It is in the respect of narrowing, because Mr. Cruz - - the only answer to that, I think is what Mr. Cruz - -

Justice Kennedy: This is not a speech case where you have standing to object to the statute that can - - would be unconstitutional as applied to others - -

Mr. Fisher: We absolutely do - -

Justice Kennedy: Or I mean - - or is there precedent that contradicts?

Mr. Fisher: There’s square precedent, unanimous holding of this Court in *Maynard* against *Cartwright* so that you can’t justify a statute that fails to narrow on as applied grounds. The constitutional infirmity is the fact that it gives unfettered discretion to prosecutors and juries to choose who to give the death sentence to - -

Justice Scalia: But I - - I don’t understand the difference. If you have a general murder law with an aggravating factor of killing of a law officer, okay, the jury can decide the whole category of killings of law officers who gets the death penalty and who doesn’t. Why is that any different from what happens when you have a statute that makes it a capital offense to kill a law officer, without any further qualifications?

It’s exactly the same result. It goes to the jury. This person killed a law officer. It is up to you whether you give him the death penalty or not.<sup>292</sup>

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<sup>291</sup> 07-343 *Kennedy v. Louisiana*, 58.

<sup>292</sup> 07-343 *Kennedy v. Louisiana*, 58-59.

After his second sentence directed toward Justice Kennedy, Justice Scalia once again disrupts Mr. Fisher's response. At this final crucial moment, Justice Kennedy's tone suggests disapproval and in the last remaining seconds Mr. Fisher must persuade Justice Kennedy of the validity of his argument. Before he is able to finish responding to Justice Kennedy, Justice Scalia challenges Mr. Fisher's response. Following Mr. Fisher's response to Justice Scalia, Chief Justice Roberts also interrupts Mr. Fisher's response to Justice Kennedy. Both Chief Justice Roberts and Justice Scalia's disruptions force Mr. Fisher away from his response to Justice Kennedy, and take up the remaining amount of Mr. Fisher's argument time.

Respondent's counsel faces a dramatically different attitude from the justices. Justice Scalia is respectful, helpful, and even saves the respondent from another justices' hypothetical. Chief Justice Roberts only interacts with the counsel once and his argument assists respondent's argument. Although Justice Breyer presents a number of challenging questions and hypotheticals, he often will say "thank you" following the respondent's retort. The questioning proves so different that Ms. Clark pauses toward the end of her delivery because she had already covered her major points. Justice Stevens has to prompt her to use more time by asking "If you're looking for time, let me ask you one question that interests me but is a little divorced from the terms of the argument so far" (42). Justice Stevens proceeds to ask a philosophical question about applying international law to the death penalty in the U.S. His question presents more of an opportunity for intellectual banter than for close consideration of the case at hand. While Ms. Clark experiences a dramatically different form of questioning from the

justices, Mr. Cruz encounters a similarly relaxed bench. Justices provide him with the opportunity for numerous lengthy responses, four significantly exceeding the one minute mark. Mr. Cruz even has an opportunity from Justice Kennedy at the end of his argument to address one of Justice Kennedy's questions, nearly an identical situation that Mr. Fisher faced. Unlike Mr. Fisher's questioning, Mr Cruz has the opportunity to respond to Justice Kennedy, and even is able to respond to Justice Kennedy's follow up question without the justices interrupting him. Mr. Cruz's response to Justice Kennedy is long enough to exhaust the remaining amount of his argument time. The Court provided him with a valuable opportunity to address the key swing vote justice without interruption; unfortunately Mr. Fisher was not provided with the same treatment.

The justices' treatment of respondent's counsel is so dramatically different that Justice Scalia actually defends and supports Ms. Clark's arguments to his fellow justices. In one instance, Justice Breyer inquires that in order to resolve this case the Court is "going to say legislatures all over the country have the right under the Constitution to go, try to categorize horrible by horrible, not just death. Not just murder."<sup>293</sup> Justice Scalia interrupts Justice Breyer's comment piping in "Just the way they used to. Right," Ms. Clark affirms Justice Scalia, stating "Exactly, your honor. I would agree."<sup>294</sup> Annoyed with Justice Scalia's remark and his intrusion, Justice Breyer responds by remarking "Perhaps at the time, 200 years ago, that's true," drawing a hearty round of laughter

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<sup>293</sup> 07-343 *Kennedy v. Louisiana*, 32.

<sup>294</sup> 07-343 *Kennedy v. Louisiana*, 32.

from the audience.<sup>295</sup> Justice Scalia's sarcasm does not derail Justice Breyer and he continues pursuing his question, but Justice Breyer's irritation with Justice Scalia's actions were apparent in the courtroom.

In a second instance in which Justice Scalia intrudes on another justices' line of questioning, he rescues Ms. Clark from one of Justice Souter's hypotheticals. In this instance, Justice Souter has presented a hypothetical that discredits Ms. Clark's reliance on a precedent.

Justice Souter: . . . . So all I'm saying is I don't think the fact that your capital murder passed muster under Lowenfield is authority for saying that the child rape statute passes muster here.

Ms. Clark: No - - Well, I agree with you on that, though I think that perhaps - -

Justice Scalia: Do you? Do you really? (untranscribed laughter).

Ms. Clark: Well, not - - I agree in the sense that - -

Justice Souter: Well, let's find out how much. (Laughter).

Justice Scalia: Didn't the - - didn't the Louisiana statute that - - that was at issue in Lownfield produce the result that if you committed intentional murder of a law enforcement officer, it was up to the jury whether to give you the death penalty or not?

Ms. Clark: Yes, correct, your Honor.<sup>296</sup>

Ms. Clark attempts to answer Justice Souter's question, but before she finishes responding, Justice Scalia questions her approach which prompts Ms. Clark to backpedal, as Justice Scalia discusses the implications of her response, and in turn reframes it within a more advantageous light. In the courtroom laughter erupted from

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<sup>295</sup> 07-343 *Kennedy v. Louisiana*, 32.

<sup>296</sup> 07-343 *Kennedy v. Louisiana*, 39-40.



Justice Scalia's act. He appeared to bolt to the microphone to prevent Ms. Clark's response. Justice Souter's response to Justice Scalia's incredulity in the form of "Well, let's find out how much," is a very different type of humor than Justice Scalia's. Where Justice Scalia has generated humor from ridiculing an advocate, Justice Souter's humor derives from poking fun at a fellow justice. Justice Souter's retort draws a round of laughter from the crowd, but undeterred Justice Scalia explains to Ms. Clark the implications of agreeing to Justice Souter's hypothetical. Justice Scalia's rescue of Ms. Clark sparks an instance in which the two justices are debating each other through Ms. Clark without providing her an opportunity to respond. The unusual situation of two justices arguing so directly through an advocate prompts another round of laughter in the room, particularly because Ms. Clark has difficulty regaining control of the argument.<sup>297</sup> In this instance, Justice Scalia provided significant assistance to Ms. Clark, and his support of the advocate was so obvious it prompted laughter from the audience and caused his colleague to tease him by suggesting "let's find out how much [she agrees]."

Justice Scalia's support is not limited to Ms. Clark, but he extends the same courtesy to Mr. Cruz. When Justice Breyer asks for clarification of a statute from Mr. Cruz, Justice Scalia answers for him, articulating the Mr. Cruz's response for him, and allowing Mr. Cruz to simply reply by stating "that's exactly right."<sup>298</sup>

Justice Breyer: You started out by saying it's the worst cases of child abuse, and that's - - child rape - - and that's why I was interested in this definition. It seems to me this definition simply covers all instances of some kind of physical intercourse with a child, including oral, vaginal, anal. I can't imagine one that

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<sup>297</sup> 07-343 *Kennedy v. Louisiana*, 49-40.

<sup>298</sup> 07-343 *Kennedy v. Louisiana*, 49.

wouldn't be covered if the victim of this is under the age of 13. Am I right in thinking it's not the worst instances; it's every instance of rape defined that way?

Mr. Cruz: You're not exactly right, Justice Breyer.

Justice Breyer: Thank you.

Mr. Cruz: The statute that is being challenged in this case was the pre-amended statute.

Justice Breyer: So the amendment - -

Mr. Cruz: So oral was not in it. And it wasn't 13; it was 12. So the statute under which Patrick Kennedy was convicted was only vaginal or anal rape.

Justice Scalia: It was not all child rape.

Mr. Cruz: Exactly.

Justice Scalia: It was not all child rape. It was only child rape up to the age of 11.

Mr. Cruz: That's exactly right. And so that was a substantial narrowing. It was 11 and younger and it was only vaginal and - -

Justice Breyer: Thank you. I see.<sup>299</sup>

As Justice Scalia makes these comments, he is turning towards Justice Breyer. So instead of addressing Mr. Cruz, his responses are directed squarely at Justice Breyer to clarify the argument Mr. Cruz is advancing. Justice Scalia offers Mr. Cruz a distinct advantage by addressing Justice Breyer for Mr. Cruz. In addition to Justice Scalia's overt assistance, his silence also proves an advantage to Mr. Cruz because no other justice interrupts as frequently as Justice Scalia, and this presents Mr. Cruz with an opportunity to advance a lengthy and potentially persuasive argument, not granted to

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<sup>299</sup> 07-343 *Kennedy v. Louisiana* 48-9.

petitioner's counsel. Justice Scalia's silence also provides Mr. Cruz with the opportunity to address two of Justice Kennedy's questions that occurred near the end of argument time. In one response Mr. Cruz speaks for 84 seconds, and in the final response at the very close of argument he addresses one of Justice Kennedy's questions for over a minute.<sup>300</sup> The other justices provide Justice Kennedy with the opportunity to have his questions resolved by respondent's counsel without interruption, but Justice Scalia does not offer the same respect in petitioner's argument.

#### *Qualitative Summary*

In summary of qualitative analysis, the justices treated petitioner and respondent's counsel in a separate and disproportionate fashion. Justice Scalia played the most significant role in the treatment of counsels as he dismissed and denigrated petitioner's counsel while supporting and rescuing respondent's counsel. While Justice Scalia's interaction largely reflects the actions of only one justice, his interruptions of Mr. Fisher's response to Justice Kennedy were a significant and unfair tactic. In oral argument it is common for a line of questioning to get derailed, but in three specific instances Justice Scalia interrupted Mr. Fisher, likely as a means of hampering his argument and diluting its effect on Justice Kennedy. His treatment of counsels substantially differed, providing Mr. Cruz with an opportunity to address Justice Kennedy at length and allowing Mr. Cruz to speak uninterrupted. Rhetorically, Justice Scalia actions could have vast consequences, potentially turning the course of a case, due to the manner in which he berated and hindered Mr. Fisher's argument. While Chief

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<sup>300</sup> See 07-343 *Kennedy v. Louisiana* pg.50-1, and pg 55-6.

Justice Roberts maintained a level of decorum and respect for both parties, his absence in respondent's argument was noticeable and a likely advantage to respondent's counsels because they did not have to struggle with his questions. Where he advanced the philosophical questions about the nature of devolving trends, or shifting societal values during petitioner's argument, Chief Justice Roberts failed to ask any similar exploratory questions to respondent. It seems asking similar questions would be a helpful tactic to gauge a balanced understanding of both sides. Furthermore, his minimized interaction in respondent's argument, enables a potentially easier argument. While Justice Breyer, Stevens, and Souter were more engaged in respondent's argument, their behavior did not reflect a lack of respect for counsel's position, nor did they press either counselor as aggressively as Justice Scalia or Chief Justice Roberts.

Qualitative analysis provides a perspective and degree of understanding that quantitative methods cannot capture. Quantitative analysis may display vigorous interaction, but it cannot reveal a justice's bullying behavior or their quick attempts to assist a counselor. Qualitative analysis calls attention to the situational qualities of rhetorical discursive interactions, capturing communicative and argumentative characteristics not illustrated by numerical abstractions. Conversely, qualitative data cannot reveal the frequency of utterances, or convey the length of time in which actions occurred. The two methods inform each other and both display an overwhelming sense of evidence towards a bias in certain justices' rhetorical discursive interaction and a preferential bias in the manner in which justices may treat counsels during oral

arguments. Both qualitative and quantitative methods convey behavior which aligns some justices with sensemaking behavior.

### **Conclusion**

I chose to include an analysis of *Kennedy v. Louisiana* because the case offered a number of contributions that varied from the prior analysis of *Morse v. Frederick*. Quantitative data did not offer the significant differences that occurred in *Morse v. Frederick*, but qualitative information provided insight into the complex differences between justices' treatment of advocates. This case highlights the importance of a mixed method approach that can capture the dynamics of communication from a variety of perspectives. Qualitative approaches displayed Justice Scalia's behavior in ways that quantitative methods did not. So this case provided an excellent display of the importance of both quantitative data and qualitative data and the rich insight they offer in conjunction with one another.

*Kennedy v. Louisiana* also captured the justices' rhetorical discursive behavior in ways that prior researchers had not considered. Analyzing the justices' individual behavior within oral arguments revealed the significant manner in which a justice can hinder or assist an advocate and how that action can influence the justices' decision making ability. Justice Scalia's disproportionate interaction very likely impacted how Justice Kennedy and the other justices evaluated the case. Instead of considering the swing justice to be the most important justice in oral arguments, Justice Scalia's behavior provides more credence for considering the most powerful or influential justice to be the most rhetorically active justice.

In regards to sensemaking behavior, Justice Scalia appeared the most blatantly biased in his interaction. At one point he accidentally articulates a point that cuts against his position in petitioner's argument, but it is clear this accidental articulation did not alter his opinion in the case; a perfect example of rejecting undesirable alternatives. Chief Justice Roberts also acted as a biased sensemaker, but in a manner that avoided the damage committed by Justice Scalia. His philosophical explorations exhausted a significant amount of time in petitioner's argument, and his silence in respondent's argument offered a distinct advantage to the advocates by preventing them from spending time on their own explanation of his philosophical questions. One round of debate between Justice Scalia and Justice Souter prevented Justice Stevens from being able to ask a question. Justice Stevens attempted to lean forward and respond to the advocate's comments, but a lengthy back and forth debate between the justices stifled his interaction. Chief Justice Roberts' behavior is much more subtle than Justice Scalia's, but his rhetorical discursive behavior offers a real advantage to one party, and hinders another. His behavior should not be overlooked. His ability to conclude arguments also played a role in this case, because as he ended petitioner's argument time, Justice Souter was leaning forward to ask a final question. Ending argument while justices still have questions clearly has the potential for limiting a justice's understanding of the case. Justice Breyer also displayed a significant difference in his interaction with advocates, and his behavior also follows a pattern of sensemaking, although he appears to accept respondent's arguments with minimal challenge. After oral argument in *Kennedy v. Louisiana*, Justices Scalia and Breyer, and Chief Justice

Roberts most likely left the courtroom with a firm conviction for which side they would vote. It is probable that they entered the courtroom with a view of how they would vote anyways, but their rhetorical discursive involvement further entrenched and most likely solidified the counsel for whom they would vote. Their rhetorical discursive interaction exhausted a substantial amount of time, clearly preventing less active justices from asking questions which may have helped resolve questions or issues. Regardless of the reason for their behavior, the active justices in this case clearly impacted how other justices were able to gather information. The active justices reflected sensemaking through biased rhetorical discursive interactions, and other less active justices (Ginsburg, Stevens, Kennedy, Souter, Alito, and Thomas) offered more balanced approaches to considering the case.

Ethnographic, Quantitative, and Qualitative approaches all revealed the process of sensemaking in some of the Court's justices. Ethnographic observation revealed the difficult situation created by a justice's humorous critique, as well as how more active justices prevent less active justices from interacting in oral argument. Quantitative findings offered clear evidence of lopsided communication, while qualitative information revealed the rhetorical discursive sensemaking bias justices enacted through the arguments they advanced. Justices in *Kennedy v. Louisiana* both displayed sensemaking behavior as well as a more balanced approach to questioning, but would justices behave in a more just and measured fashion if the case were of significant historical value or held significant social repercussions for the country? It seems reasonable that the justices would want to ensure a more careful consideration of

important nationally prominent cases. The next chapter attempts to answer this question by examining the justices' rhetorical discursive interaction in *District of Columbia v. Heller*.



## CHAPTER VI

### HISTORICAL REPERCUSSIONS OF JUDICIAL SENSEMAKING

#### *DISTRICT OF COLUMBIA V. DICK ANTHONY HELLER*

Second Amendment: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.”<sup>301</sup>

Chief Justice Roberts: “What is reasonable about a total ban on possession [of guns]”

Counsel: “What is reasonable . . . is that it’s a ban on the possession of one kind of weapon, of handguns, that’s been considered especially dangerous.”

Chief Justice Roberts: “So if you have a law that prohibits the possession of books, it’s all right if you allow the possession of newspapers?”<sup>302</sup>

Prior chapters presented analysis of two oral arguments that displayed judicial sensemaking behavior in the majority of the justices but also revealed how each argument elicited varied reactions by the justices. Justices’ communicative interactions should vary as each case relates to a separate set of personal commitments. We should not expect to see identical behavior for every case. Analysis of oral arguments cannot prove definitively whether or not arguments and information offered in oral argument altered a justice’s evaluation of a case. But from the justices’ personal accounts, we know the importance the act of oral argument holds for them, and we also know that language may influence actors by ways in which they are unaware. It would also be an impossible feat to identify with certainty what directly influenced a justice’s thinking, but we could probably agree that the treatment and consideration justices gave to the prior cases, was less than desirable. We could also agree that it seems likely, if not

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<sup>301</sup> Second Amendment, U.S. Constitution.

<sup>302</sup> U.S. 07-290 *District of Columbia v. Dick Anthony Heller*, 18-19 (ln.20-04).

certain, that justices' consideration of a case was influenced by communication within oral arguments. A justice's speech may stifle a counsel's arguments, advance personally appealing arguments, and prevent less active justices from asking questions, which likely shapes the manner by which other justices as well as the active speaking justice to evaluate the case. We should expect a more careful analysis and mode of inquiry from our nation's highest court.

The previous two cases may be considered minor cases in the overall landscape of the Supreme Court. Although they attracted national attention regarding the situations and problems addressed by the Court, none were rare historic cases in the theme or law addressed. *Morse v. Frederick* proved an intriguing case regarding students' freedom of speech. *Kennedy v. Louisiana* was a unique test of the constitutional limits of the death penalty surrounding child rape. Each of these cases resulted in significant legal developments, but influential historic cases respond to heavy cultural issues, forge new historic legal ground, and attract national attention from the legal community because of the social implications surrounding the Court's decision. If one had to create a list of the top five historic cases the Court has heard in the past fifty years, most people would probably agree that *Brown v. Board of Education*, *Roe v. Wade*, and *Bush v. Gore* would top the list. Other cases in contention might be *Mirandav. Arizona*, *Tinker v. Des Moines*, *Bakke v. Regents of the University of California*, and *District of Columbia v. Heller*, which may eventually join the historic ranks.

Since the previous three cases were interesting but generally minor cases, the question arises: would justices behave more carefully in major historic cases? If justices

do not behave any differently, then how might our country's legal landscape have been shaped by the justices' rhetorical discursive interaction in oral arguments? It seems reasonable to believe that because historic cases may result in significant social developments, the justices pay particularly close attention to discerning the best possible solution. We would hope that they remain open and provide both counsels with an equal opportunity to present arguments and information. On the other hand, it may also seem reasonable that the justices have already formed their perspective on weighty social issues and are unlikely to change their opinion of them. Below the title of this chapter, the excerpted lines from oral argument suggest that Chief Justice Roberts may already have his mind made up as he advances an absurd comparison between guns and reading material. The Chief Justice's example clearly over simplifies the situation and the answer to his ridiculous question is obvious. However, this example is only one instance out of the lengthy oral argument involved in this case, and further consideration should be given to the entire Court's interactions.

### **Background**

In order to gauge the justices' interaction and approach in historic cases, I examined the famous 2008 second amendment case, *District of Columbia v. Dick Anthony Heller*. The case maintains the same justices that participated in the previously analyzed cases and fell at about the same time as the other cases, which ensured a consistency among actors in the cases. As the first Second Amendment case in nearly seventy years, the case also provided a unique opportunity because the justices had not ruled on a prior gun rights case before and thus may not have developed entrenched

perspectives. The case arose from wealthy libertarian, Robert A. Levy, a prominent fellow at the Cato Institute, who manufactured six lawsuits to force the Supreme Court to address the issue of gun laws. Mr. Levy recruited and financed the lawsuits of six plaintiffs that wanted to keep handguns in their homes for self-defense purposes. The cases were designed to challenge whether law abiding citizens had the right to protect themselves in their homes. Out of the six cases, five were dismissed for lack of standing. Anthony Heller's case divided the lower courts and forced the Supreme Court to take up the issue.<sup>303</sup>

Security guard Anthony Heller applied for a gun permit in the District of Columbia for his handgun. The District of Columbia denied Mr. Heller's application citing a ban on handguns for all people outside of law enforcement. Mr. Heller challenged the constitutionality of D.C.'s handgun ban dividing upper and lower courts in crossed decisions. The Supreme Court heard the case, in part to resolve the disagreement between lower courts, but also to address the larger issue of growing restrictions on gun laws across the nation. The case was the first second amendment case heard by the Court since 1939 in *United States v. Miller* where the Court rejected a sawed off shotgun as an "arm" protected by the second amendment. *Heller* drew worldwide attention because at question was the primary interpretation of the second amendment, an issue the Court ignored in *Miller*.<sup>304</sup>

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<sup>303</sup> For more on the story see Linda Greenhouse, "Case Touches a 2<sup>nd</sup> Amendment Nerve," *New York Times*. 11/13/2007.

<sup>304</sup> Lexis Nexus reports nearly 3,000 articles on the topic between March 1, 2008 and July 1, 2008. For a variety of the coverage regarding the case see Edwin M. Yoder, "Bearing Arms and Verbal Harms," *The Washington Times*. 3/5/08., Sean Hayes, "Guns in America," *Korea Times*. 3/18/08., Linda Greenhouse,

In *Heller*, the Court was poised to respond to whether individuals have a Constitutional right to “bear arms,” separate from their connection to a “well regulated Militia.” Nearly every state filed an *amicus curiae* and Vice President Dick Cheney submitted his own *amicus* in an attempt to counter Solicitor General, Paul D. Clement’s support for the petitioner in oral argument. *Heller* provides a nearly ideal example for the complexity and ambiguity justices must struggle with when trying to resolve major questions regarding the interpretation of the Constitution. Justices explored historical case law connected to various colonial laws as well as historic British laws to determine the amendment’s interpretation. The justices also grappled with determining a primacy among the clauses, giving weight to either the individual or the militia within the amendment’s ambiguous phrasing and historical situation. To further complicate matters, grammar rules were not standardized at the time of the Constitution and it is unclear whether the Framers read the amendment in the same way that current readers’ understand it. Discussion of the case was vigorous at oral argument with nearly every justice participating and the case provides a good example of how justices interact within historic cases. Methodology follows a pattern similar to the previous case analyses, but I was not present to observe oral argument.

Oral arguments in *D.C. v. Heller* were vigorous, engaging every justice on the bench, but Justice Thomas. The interaction followed a pattern similar to the other cases

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“Court weighs right to guns and its Limits,” *New York Times* 3/19/2008., “Ruling tests constitution on American’s sacred right to bear arms,” *The Australian*. 6/27/08., “The Supreme Court Opens Fire,” *The Economist*. 6/28/08., Adam Liptak, “Gun Laws and Crime: A Complex Relationship,” *New York Times*. 6/29/08, and Christopher Kromphardt, “Handing down history,” *University Wire*. 7/1/2008. All accessed on 11/1/09

considered in this study with justices spending the greatest amount of time arguing against the advocate whom they eventually voted against. Oral argument lasted 23 minutes longer than its scheduled time, a very unusual move by Chief Justice Roberts, but a positive sign that he wanted the justices to have an opportunity to ask any necessary questions they may have. This is an encouraging instance that the Court does recognize, in some instances, the need for extra time for justices and advocates to be satisfied in their consideration or advancement of arguments. The case was settled in a 5-4 vote with Chief Justice Roberts, and Justices Scalia, Alito, Thomas, and Kennedy voting in favor of the respondent and Justices Stevens, Souter, Ginsburg, and Breyer voting for the petitioner. Analysis in this case must be nuanced to account for the discrepancy in speaking times each counsel received. Petitioner's counsel argued for nearly 40 minutes joined by the Solicitor General's presentation of more than 20 minutes, and respondent's counsel argued for over 37 minutes. The Solicitor General's presentation creates additional opportunities for interruptions and prevents direct comparisons between parties; however, the Court provides both petitioner's advocate and respondent's advocate with nearly equal time allotments, so I have tried to distinguish differences between the justices' behavior in petitioner's advocate's argument and the Solicitor General's presentation.

***District of Columbia v. Dick Anthony Heller***

Table 6.1 lists the number of interruptions generated from both transcript and audio file.

Table 6.1 *Interruptions*

|                   | Roberts   | Scalia    | Alito    | Kennedy   | Thomas   | Breyer   | Souter   | Stevens   | Ginsburg | Total     |
|-------------------|-----------|-----------|----------|-----------|----------|----------|----------|-----------|----------|-----------|
| <b>Petitioner</b> | <b>23</b> | <b>16</b> | <b>4</b> | <b>16</b> | <b>0</b> | <b>1</b> | <b>7</b> | <b>12</b> | <b>7</b> | <b>86</b> |
| <i>Dellinger</i>  | 20        | 11        | 3        | 12        | 0        | 1        | 2        | 3         | 3        | 55        |
| <i>Clement</i>    | 3         | 5         | 1        | 4         | 0        | 0        | 5        | 9         | 4        | 31        |
| <b>Respondent</b> | <b>7</b>  | <b>7</b>  | <b>0</b> | <b>0</b>  | <b>0</b> | <b>4</b> | <b>5</b> | <b>14</b> | <b>7</b> | <b>44</b> |

In considering the rate of interruptions, justices reflected biased sensemaking behavior by primarily interrupting the party whom they voted against. Removing the justices' interruptions during General Clement's presentation allows for a closer comparison between advocates' arguments, but including the justices' interruptions assists in understanding how justices may have become entrenched by heavily interrupting both advocate and General. Including General Clement in our understanding of justices' interactions in petitioner's argument, we can see a dramatic difference between those justices who voted against the petitioner and those who voted in favor. Chief Justice Roberts, and Justices Scalia, Alito, and Kennedy comprise over 67% of interruptions during petitioner's argument time. And when compared to the types of statements articulated by justices in the following table, the justices primarily interrupted to challenge Mr. Dellinger or General Clement. Similarly, those justices who voted against Mr. Gura accounted for over 68% of interruptions, although Justice Stevens heavily contributed to this number by controlling nearly a third of the interruptions. Again, when compared with the following table, the majority of justices' interruptions challenged Mr. Gura's argument. When comparing the number of

interruptions faced by Mr. Dellinger and Mr. Gura, they both endure a relatively similar amounts of interruptions, but there are glaring discrepancies between the number of interruptions committed by Chief Justice Roberts, and Justices Scalia and Kennedy in Mr. Dellinger's argument and those interruptions made during Mr. Gura's argument. Chief Justice Roberts, and Justices Scalia and Kennedy comprise over 78% of interruptions during Mr. Dellinger's argument time. Those same justices comprise fewer than 32% of Mr. Gura's interruptions, less than half the percentage of interruptions faced by Mr. Dellinger. The number of interruptions faced by Mr. Dellinger suggests a more difficult argument due to a more hostile environment created by the justices' interactions. Mr. Gura appears to have encountered a challenging argument from Justice Stevens. Although Justice Stevens' arguments in general tend to be more inquisitive than hostile, in this case he takes on a particularly aggressive approach.

Table 6.2 lists the number of challenging (C/), assisting (A/), or neutral (N/) statements or questions posed to each counsel by the justices. Numbers in parentheses represent the distribution of interruptions within Mr. Dellinger's and General Clement's argument time. (Mr. Dellinger/General Clement).



Table 6.2 *Statements*

|                | <b>Roberts</b>       | <b>Scalia</b>       | <b>Alito</b>      | <b>Kennedy</b>      | <b>Thomas</b> | <b>Breyer</b>     | <b>Souter</b>     | <b>Stevens</b>      | <b>Ginsburg</b>   |
|----------------|----------------------|---------------------|-------------------|---------------------|---------------|-------------------|-------------------|---------------------|-------------------|
| <b>C/pet.</b>  | <b>22</b><br>(10/12) | <b>19</b><br>(11/8) | <b>3</b><br>(2/1) | <b>16</b><br>(10/6) | <b>0</b>      | <b>1</b><br>(1/0) | <b>4</b><br>(0/4) | <b>5</b><br>(2/3)   | <b>2</b><br>(1/1) |
| <b>A/pet.</b>  | <b>0</b>             | <b>0</b>            | <b>0</b>          | <b>0</b>            | <b>0</b>      | <b>0</b>          | <b>4</b><br>(3/1) | <b>12</b><br>(2/10) | <b>6</b><br>(3/3) |
| <b>N/pet.</b>  | <b>2</b><br>(0/2)    | <b>0</b>            | <b>2</b><br>(1/1) | <b>1</b><br>(1/0)   | <b>0</b>      | <b>0</b>          | <b>1</b><br>(0/1) | <b>0</b>            | <b>0</b>          |
| <b>Total</b>   | <b>24</b>            | <b>19</b>           | <b>5</b>          | <b>17</b>           | <b>0</b>      | <b>1</b>          | <b>9</b>          | <b>17</b>           | <b>8</b>          |
| <b>C/resp.</b> | <b>7</b>             | <b>2</b>            | <b>0</b>          | <b>7</b>            | <b>0</b>      | <b>9</b>          | <b>8</b>          | <b>17</b>           | <b>8</b>          |
| <b>A/resp.</b> | <b>2</b>             | <b>7</b>            | <b>0</b>          | <b>0</b>            | <b>0</b>      | <b>0</b>          | <b>0</b>          | <b>0</b>            | <b>0</b>          |
| <b>N/resp.</b> | <b>0</b>             | <b>0</b>            | <b>0</b>          | <b>0</b>            | <b>0</b>      | <b>0</b>          | <b>0</b>          | <b>0</b>            | <b>0</b>          |
| <b>Total</b>   | <b>9</b>             | <b>9</b>            | <b>0</b>          | <b>7</b>            | <b>0</b>      | <b>9</b>          | <b>8</b>          | <b>17</b>           | <b>8</b>          |

The justices' interactional discrepancies between parties suggest biased rhetorical discursive interactions. In particular, Chief Justice Roberts, and Justices Scalia, Kennedy, Breyer, Souter, Stevens, and Ginsburg have imbalanced interactions. Justices Alito and Thomas appear to be the only justices who do not disproportionately interfere with the advocates' arguments. Although he tends to be an active participant, Chief Justice Roberts does not typically play a more dominant role than Justice Scalia. Qualitative data will also reveal that Chief Justice Roberts held a number of personal questions about the case and his high level of interaction may have resulted from his questions rather than a preferential treatment of advocates. However, under sensemaking, it is important for readers to remember that Chief Justice Robert's biased

rhetorical discursive interactions indicate the potential for skewed decision making.

Why did he not pose similar inquisitive questions to the respondent?

Not surprisingly, Justice Scalia's behavior reveals a clear preference for respondent's counsel. His assistance of respondent's argument makes obvious his voting position within this case. Justice Kennedy's behavior also displays biased rhetorical discursive interaction as he challenges petitioner's advocate and General Clement more stringently than respondent's advocate. Justice Breyer interacts very little in petitioner's argument, but plays a much more pronounced role in respondent's argument. Justice Souter assists petitioner's counsel without ever equally assisting respondent's counsel. Surprisingly, Justice Stevens, who typically is not the most active justice in oral arguments, takes the role as the most active justice in respondent's argument. Justice Stevens actively assists petitioner's counsel while heavily challenging respondent's counsel. His behavior provides extensive aid to petitioner without similarly treating respondent's counsel in the same manner. Finally, Justice Ginsburg also lends a significant amount of assistance to petitioner with extending the same opportunity to respondent. The assistance offered by Justices Stevens and Ginsburg are comments that bolster the petitioner's argument, but they also advance arguments separate from those proposed by petitioner's advocates, causing petitioner's advocate to use valuable time explaining the benefits of his approach.

In assessing whether Mr. Dellinger and Mr. Gura, as advocates for their clients, endured similar levels of questioning, separating the justices' interactions in petitioner's argument enables a closer scrutiny of the rhetorical discursive pressure advocates faced.

Chief Justice Roberts offers a relatively balanced treatment of Mr. Dellinger and Mr. Gura, although he offers Mr. Gura assistance in two instances, while not providing Mr. Dellinger with a similar opportunity. Justice Scalia's level of interaction is somewhat equal, but the type of interaction demonstrates that he heavily assists respondent's counsel. Justice Kennedy's behavior becomes more balanced as he relatively equally challenges Mr. Dellinger and Mr. Gura. Justice Breyer's imbalanced rhetorical discursive interaction does not change our understanding of his behavior. Justice Souter lends three assisting statements to Mr. Dellinger without once challenging his position. Conversely, he heavily challenges Mr. Gura without offering similar support. Justice Ginsburg's balanced interaction in petitioner's argument illuminates further the discrepancy between her treatment of Mr. Dellinger and Mr. Gura, forcing Mr. Gura to endure a more stringent inquiry than Mr. Dellinger.

In general, justices appeared to once again more heavily challenge the counsel whom they voted against. It is unclear as to whether this could be the result of minds already made up, or oral arguments further shaping their cognitive positions, but regardless of the reason for their interaction, it is important to recognize that the rhetorical discursive process is lopsided and offers imbalanced consideration. The justices' heavy attention directed towards petitioner's counsel and the General presents problems for the evaluation of the case, as those justices in opposition to petitioner's position become more firmly cognitively entrenched because they are given an opportunity to more heavily challenge petitioner's position. Those justices supporting the petitioner's position are also given a longer amount of time to continue their support

and further entrench their position. Respondent's argument does not offer a similar opportunity because of the shortened amount of argument time. The difference in time did not result in a difference in questioning by the justices because Mr. Dellinger and Mr. Gura endured an equal amount of challenges and assistance from the justices. An examination of speaking time will help further our understanding of the justices' interactions and the ability of advocates to advance their arguments.

Table 6.3 displays petitioner's oral argument including rebuttal time. Total speaking time: 60 min 17 sec (Dellinger = 39 min 16 sec, Clement = 21min 1 sec). Table 6.3 also displays respondent's oral argument. Total speaking time: 37 minutes 5 seconds.

Table 6.3 *Speaking Time*

| <u>Petitioner</u> |   |                |                |               |                |  |               |               |                |                 |                 |
|-------------------|---|----------------|----------------|---------------|----------------|--|---------------|---------------|----------------|-----------------|-----------------|
|                   | <i>Dell</i>   | <i>Clem.</i>   | <b>Roberts</b> | <b>Scalia</b> | <b>Alito</b>   | <b>Kennedy</b>                                       | <b>Thomas</b> | <b>Breyer</b> | <b>Souter</b>  | <b>Stevens</b>  | <b>Ginsburg</b> |
| <b>Seconds</b>    | 1499  | 745            | 281            | 274           | 101            | 274  | 0             | 46            | 141            | 106             | 116             |
| <b>Total</b>      | <b>Pet. = 2244 (37 min 24 sec)</b>                    |                |                |               |                | <b>Justices = 1339 (22 min 19 sec)</b>               |               |               |                |                 |                 |
|                   | <i>Dellinger = 24min 59sec, Clement = 12min 25sec</i> |                |                |               |                | <i>Dellinger = 13min 48sec, Clement = 8min 31sec</i> |               |               |                |                 |                 |
| <u>Respondent</u> |   |                |                |               |                |  |               |               |                |                 |                 |
|                   | <i>Gura</i>   | <b>Roberts</b> | <b>Scalia</b>  | <b>Alito</b>  | <b>Kennedy</b> | <b>Thomas</b>  | <b>Breyer</b> | <b>Souter</b> | <b>Stevens</b> | <b>Ginsburg</b> |                 |
| <b>Seconds</b>    | 1115  | 99             | 78             | 0             | 87             | 0  | 435           | 124           | 145            | 117             |                 |
| <b>Total</b>      | <b>Resp. = 1115 (18 min 35 sec)</b>                   |                |                |               |                | <b>Justices = 1085 (18 min 5 sec)</b>                |               |               |                |                 |                 |

Differences between speaking times for petitioner and respondent are dramatic, in part because of the Solicitor General presenting during petitioner's argument. Petitioner is provided with over an hour of argument time, while the respondent's counsel is given over 37 minutes to argue his case. When separating respondent's counsel's speaking time from General Clement, a more equal picture develops with 2 minutes separating the advocates, not an insignificant amount of time, but a reasonable difference given their extended argument time. Although the time allotted to advocates is similar in length, the justices' interaction within the advocates' time is substantially different. Mr. Dellinger speaks for nearly 25 minutes, or 64% of his argument time. The justices' active involvement in his argument accounts for nearly 14 minutes. Conversely, Mr. Gura argues for less than 19 minutes with the justices speaking for over 18 minutes allowing Mr. Gura to present for barely over 50% of his argument time. Mr. Dellinger enjoys a delivery advantage of over 6 minutes, a substantial amount of time in oral arguments.

The previous analysis of the justices' statements suggests a pattern of biased sensemaking, but further examination of the time justices speak during a counsel's argument also contributes to a further understanding of the justices' influence in a party's oral argument. For example, Justice Breyer only made nine statements in challenging respondent's argument, almost half the number of statements spoken by Justice Stevens in the same argument, giving the impression that Justice Stevens dominated the argument. However, Justice Breyer spoke for two-thirds longer than Justice Stevens, using substantially more of respondent's time. Both Justice Breyer's

and Justice Stevens' rhetorical discursive interactions suggest biased sensemaking behavior. Justices' behavior in general reflects biased sensemaking behavior in their interactions. Justices who voted against petitioner accounted for nearly 70% of the time that justices spoke in petitioner's argument. Similarly, justices who voted against the respondent accounted for over 75% of the justice's spoken time in respondent's argument. Justice Breyer engaged nearly 40% of the justices' time, a substantial amount of time largely due to his lengthy hypotheticals.

Justices' interactions exhausted a substantial amount of advocates' argument time. Because this case involved argument time that was extended by Chief Justice Roberts, it is difficult to estimate the impact of the justices' interactions. The extended issue of argument time will be dealt with more fully in the qualitative section that follows, but the extended time may result from the Chief Justice recognizing the need for justices to have their questions satisfied by advocates. The justices' interaction in Mr. Gura's argument did limit his ability to advance his arguments in the same manner that Mr. Dellinger was able to advance his position, and Mr. Dellinger enjoys over 6 additional minutes in his argument, giving him a significant rhetorical advantage over Mr. Gura. To further understand the justices' interactions and rhetorical advantages a consideration of speaking timeframes can assist us in considering how the justices' interactions may have stifled or enabled advocates' ability to present their arguments.

Table 6.4 displays the number of speaking instances in which lawyers were able to speak for a certain timeframe.

Table 6.4 *Lawyer's Speaking Timeframes*

| <b>Seconds</b>    | <b>1-10</b> | <b>11-20</b> | <b>21-30</b> | <b>31-40</b> | <b>41-50</b> | <b>51-60</b> | <b>61+</b> |
|-------------------|-------------|--------------|--------------|--------------|--------------|--------------|------------|
| <b>Petitioner</b> | <b>33</b>   | <b>24</b>    | <b>14</b>    | <b>14</b>    | <b>5</b>     | <b>3</b>     | <b>4</b>   |
| <i>Dellinger</i>  | 22          | 16           | 9            | 5            | 4            | 1            | 4          |
| <i>Clement</i>    | 11          | 8            | 5            | 9            | 1            | 2            | 0          |
| <b>Respondent</b> | <b>33</b>   | <b>14</b>    | <b>4</b>     | <b>7</b>     | <b>2</b>     | <b>1</b>     | <b>2</b>   |

When comparing speaking time frames between petitioner's advocate and respondent's, justices force respondent's advocate to make the majority of his statements within one and ten seconds. Mr. Dellinger exceeds Mr. Gura in nearly every other timeframe category, and not captured in this table are Mr. Dellinger's 124min, 120min, and 94min responses. Clearly the justices afford Mr. Dellinger more extensive opportunities to advance his arguments offering him a greater opportunity at persuading the justices and getting them to understand his position. The justices force Mr. Gura to keep his responses short, potentially limiting the effectiveness of his argument. In general, the justices present Mr. Dellinger with opportunities that Mr. Gura is not offered, largely due to some of the justices active and prolonged involvement.

In summary of the quantitative analysis, justices' behavior within a historically significant case appears to reflect biased sensemaking characteristics. Justices appear to more heavily challenge the party with whom they will eventually vote against and assist the party whose position they support. Chief Justice Roberts, and Justices Scalia and Kennedy more heavily challenged petitioner's counsel and the Solicitor General than

they challenged respondent's counsel. Similarly Justices Breyer, Souter, Stevens, and Ginsburg heavily challenged respondent's counsel while not holding petitioner's counsel to the same stringent questioning. Quantitative data suggests that the justices may not alter their behavior in historically significant cases, but qualitative analysis may provide a more comprehensive understanding of the case and the justices' rhetorical discursive interactions.

### **Qualitative Analysis**

Justices engaged in vigorous interaction in oral arguments, and justices' interactions prevented other justices from having their questions answered. Remarkably though, Chief Justice Roberts extended argument time by 23 minutes.

Chief Justice Roberts: Why don't you remain Mr. Dellinger. We'll make sure you have rebuttal.

Justice Kennedy: Yes, because I did interrupt Justice Breyer.<sup>305</sup>

Chief Justice Roberts' willingness to extend advocates' argument time suggests a couple of important discoveries. First, his extension of time may indicate that he is aware when justices may not have their questions answered and in this case he feels it important for all the justices to have their questions answered. I have not ever witnessed Chief Justice Roberts extend argument time, even in other active oral arguments where it appeared justices still had lingering questions. His reason for extending argument time may also be due to the importance of the case, which points to the second important discovery, namely that Chief Justice Roberts recognizes, in historically significant cases, that the

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<sup>305</sup> U.S. 07-290 *District of Columbia v. Dick Anthony Heller*, 25.



justices should have their questions properly addressed without the burden of time limits. He wisely gives each advocate a relatively equal amount of time, even though the Solicitor General is afforded additional time in the petitioner's argument. Chief Justice Roberts' extension of time suggests that oral argument can be flexible, and his primary concern may lie with the justices' comprehensive understanding of a case, rather than efficiently reviewing cases.

Chief Justice Roberts' time extension may also be due to his own desire to have questions answered about the case. In particular, he spends a large amount of time questioning Mr. Dellinger about the trigger locks required by the District of Columbia. In his questioning, Chief Justice Roberts implies that he has no understanding of how trigger locks function.

Chief Justice Roberts: Well, before you start with it, how many minutes does it take to remove a trigger lock and load a gun? Because both the gun has to be unloaded; it has to have a trigger lock under the District laws.

Mr. Dellinger: Those are alternatives, Mr. Chief Justice.

Chief Justice Roberts: No, disassembled--

Mr. Dellinger: Just a trigger lock.

Chief Justice Roberts: --In either case it has to be unloaded, correct?

Mr. Dellinger: There are some versions of the trigger lock that allow you to put the trigger lock on and then load the gun. But the piece that goes in the trigger mechanism, even someone as clumsy as I could remove it in a second--

Chief Justice Roberts: Well, the law, as I understand it, says that the gun has to be unloaded. So under your hypothetical, I assume that would violate the District's law if the gun is still loaded.

Mr. Dellinger: --You know, it's a question of where you put the parenthesis. I read that as disassembled and unloaded or under a trigger lock, and that's the, that's the way the District--

Chief Justice Roberts: So how long does it take? If your interpretation is correct, how long does it take to remove the trigger lock and make the gun operable.

Mr. Dellinger: --You... you place a trigger lock on and it has... the version I have, a few... you can buy them at 17th Street Hardware... has a code, like a three-digit code. You turn to the code and you pull it apart. That's all it takes. Even... it took me 3 seconds.

Justice Scalia: You turn on, you turn on the lamp next to your bed so you can... you can turn the knob at 3-22-95, and so somebody--

Mr. Dellinger: Well--

Chief Justice Roberts: Is it like that? Is it a numerical code?

Mr. Dellinger: --Yes, you can have one with a numerical code.

Chief Justice Roberts: So then you turn on the lamp, you pick up your reading glasses...--  
[Laughter]

Mr. Dellinger: Let me tell you. That's right. Let me tell you why at the end of the day this doesn't... this doesn't matter, for two reasons. The lesson--

Chief Justice Roberts: It may not matter, but I'd like some idea about how long it takes.

Mr. Dellinger: --It took me 3 seconds. I'm not kidding. It's... it's not that difficult to do it.

That was in daylight. The other version is just a loop that goes through the chamber with a simple key. You have the key and put it together. Now, of course if you're going... if you want to have your weapon loaded and assembled, that's a different matter. But here's where I want to address the trigger lock. Here's why it doesn't matter for the handgun law. The District believes that what is important here is the ban on handguns. And it also believes that you're entitled to have a functional, usable weapon for self-defense in the home, and that's why this is a very proportionate law.

Chief Justice Roberts: Well, if proportionate, in other words you're saying your interest is allowing self-defense in the home--

Mr. Dellinger: Yes.<sup>306</sup>

The back and forth discussion between Chief Justice Roberts and Mr. Dellinger indicates that Chief Justice Roberts is trying to understand how trigger locks function. It is somewhat disturbing that the Chief Justice did not attempt determining how they work before listening to oral arguments on the matter. Instead, he turns to the advocate for an explanation, and Mr. Dellinger's poor response enables Justice Scalia to reframe the hypothetical in a disadvantageous manner noting "You turn on, you turn on the lamp next to your bed so you can... you can turn the knob at 3-22-95, and so somebody—" prompting Chief Justice Roberts to humorously poke fun at Mr. Dellinger's response, "Is it like that? Is it a numerical code? . . . So then you turn on the lamp, you pick up your reading glasses...-- [Laughter]." Mr. Dellinger's inability to advantageously respond to Chief Justice Roberts' question enables Justice Scalia to provide a ridiculous example that will more likely influence Chief Justice Roberts' consideration of the case than a further reasonable explanation by Mr. Dellinger. The Chief Justice's line of questioning displays his own need to have questions answered, and his willingness to extend argument time both for his own unanswered questions and those of his colleagues.

These two examples point to a willingness by the Chief Justice to extend argument time for the sake of unanswered questions in an important case, suggesting that oral argument time is flexible and does not follow the dogmatic protocol of the Rehnquist court. In other words, Chief Justice Roberts, at times, approaches oral

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<sup>306</sup> U.S. 07-290 *District of Columbia v. Dick Anthony Heller*, 82-5.

argument with a sensitivity to justices' questions. In other oral arguments I observed, such as *Kennedy v. Louisiana*, justices were unable to ask questions or have issues satisfied. It may be helpful for Chief Justice Roberts to continue remaining flexible with oral argument time limits to ensure the justices have their questions properly addressed by advocates.

Chief Justice Roberts is not the only justice holding questions about the case. Justice Breyer uses his hypothetical to explore various positions with respondent's counsel. Although for brevity purposes I will not include all of Justice Breyer's lengthy hypothetical, his use of exploratory language foregrounds his desire to work through the issues at hand, and may display a less biased approach to sensemaking than his colleagues. Justice Breyer lays out his main problem early in Mr. Gura's argument.

Justice Breyer: You're saying this is unreasonable and that really is my question because I'd like you to assume two things with me, which you probably don't agree with, and I may not agree with them either. Assume that there is an individual right, but the purpose of that right is to maintain a citizen army . . . so it informs what's reasonable and what isn't reasonable. Assume this is favorable to you but not as favorable as you'd like. . . . Now focus on the handgun ban. As I read these 80 briefs - - and they were very good, I mean really good and informative on both sides - - and I'm trying to boil down the statistics where there is disagreement. . . . I read the two military briefs as focusing on the nature of the right, which was quite a pretty good argument there that the nature of the right is to maintain a citizen army. But how does that make it unreasonable for a city with a very high crime rate . . . to say no to handguns? . . . I want to hear what the reasoning is because there is a big crime problem. I'm simply getting you to focus on that.<sup>307</sup>

Justice Breyer's hypothetical neatly frames his thinking about the case and suggests that he is fairly considering a multitude of variables in resolving the case. He admits the

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<sup>307</sup> U.S. 07-290 *District of Columbia v. Dick Anthony Heller*, 50-3.

difficulty in resolving this case by referencing the numerous briefs and acknowledging that they were “really good and informative on both sides.” His hypothetical serves as a test to evaluate a compromise between the issues as he asks Mr. Gura to “assume two things with me, which you probably don’t agree with, and I may not agree with them either.” Justice Breyer’s invitation for Mr. Gura to enter into the hypothetical suggests that he is testing the issues without being fully committed, laying forth reasoning that is “favorable to” Mr. Gura, “but not as favorable as [he]’d like.” Justice Breyer explains the competing nature of a citizen army and the need for a city to control crime, and asks Mr. Gura to respond to those issues in particular. The significance of this exchange lies in the unique situation of a justice explaining the crucial issues that are controlling their perspective of the case. Justice Breyer presents Mr. Gura with a view of his perspective of the case, and suggests that he is fairly open to considering the issues before him, if Mr. Gura can properly address the issues. Justice Breyer’s hypothetical exhausts a substantial amount of argument time as he spends over three minutes explaining this single hypothetical. Unfortunately after his extensive hypothetical that painstakingly presented a complex hypothetical, Justice Stevens disrupts Mr. Gura’s response after less than 30 seconds, most likely leaving Justice Breyer frustrated without an answer.

In another instance of Justice Breyer’s questioning he again demonstrates his thought process in openly considering the issues before him. His discussion moves through the points mentioned by Mr. Gura and ties them to larger philosophical ponderings of hand gun regulation.

Justice Breyer: Why... now, when say "keep" and "bear", I mean you are... I think you're on to something here. Because you say let's use our common sense and see

what would be the equivalent today. . . .Fine, just as you could keep pistols loaded but not... not loaded. You had to keep powder upstairs because of the risk of fire. So today, roughly, you can say no handguns in the city because of the risk of crime. Things change. But we give in both instances, then and now, leeway to the city and States to work out what's reasonable in light of their problems. Would that be a way of approaching it?

Mr. Gura: [response excerpted]

Justice Breyer: And I agree with you that this, the firearm analogy, floats up there, but it isn't going to decide this case . . . .What you've suddenly given me the idea of doing, which I'm testing, is to focus not just on what the kind of weapon is... don't just look to see whether it's a cannon or a machine gun, but look to see what the purpose of this regulation is, and does it make sense in terms of having the possibility of people trained in firearms? . . . We have regulation worried about crime, back to my first question.<sup>308</sup>

Justice Breyer suggests that Mr. Gura's prior argument is valid as he notes "I think you're on to something." Justice Breyer's statement conveys the helpful quality he finds in Mr. Gura's comments, as he attempts to resolve the issues at hand. Building upon the inspiration Mr. Gura generated, Justice Breyer proposes considering the purpose of prior gun regulation in Massachusetts in 1895, asking Mr. Gura "Would that be a way of approaching it?" Justice Breyer's question invites Mr. Gura to assist Justice Breyer in addressing the problem of gun regulation looking upon Mr. Gura as an equal and relying on him to propose a solution to the justice's problem. Justice Breyer continues the process of generating a solution as he mentions "you've suddenly given me the idea of doing, which I'm testing, is to focus not just on the kind of weapon . . . but look to see what the purpose of this regulation is . . . ." Justice Breyer's statement highlights his desire in "testing" the idea he advances to determine how Mr. Gura might respond to the

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<sup>308</sup> U.S. 07-290 *District of Columbia v. Dick Anthony Heller*, 64-66.

solution Justice Breyer has just uncovered. He then connects his solution to the first question he originally asked Mr. Gura to address in the first hypothetical.

Justice Breyer's hypotheticals and open discussions with advocates often exhausts a substantial amount of argument time, and it may prove more difficult for Justice Breyer to be engaged in an advocate's argument than to have Justice Scalia's barbed questions, because advocates may skirt or easily bypass Justice Scalia's questions but must patiently endure Justice Breyer's hypotheticals as he weaves a complex scenario to which few advocate's can succinctly and satisfactorily respond. In this case, Justice Breyer's statements eliminate over seven minutes of Mr. Gura's argument time, and it is unclear whether Mr. Gura satisfied Justice Breyer with his responses. While the quantitative data suggests that Justice Breyer may have been engaging in biased sensemaking behavior, a review of Justice Breyer's rhetorical discursive interactions indicate that the justice may have been attempting to press respondent's counsel to assist him in resolving a problem or difficulty he recognized in the case. Each discussion displayed in the qualitative section displays a process of open consideration in which Justice Breyer appears willing to shift or alter his position if the advocate can resolve his issue with the case.

While Chief Justice Roberts, and Justice Breyer look to the advocates for answers to their problems with the case, Justice Stevens behaves more aggressively in challenging respondent's counsel. Justice Stevens heavily challenges respondent's counsel and it is difficult to discern whether his tone implies any disrespect to the advocate, but his rapid fire responses cause Justice Scalia to rescue the advocate.

Justice Stevens: How do you explain the fact that you include self-defense, but only two States, Pennsylvania and Vermont, did refer to self-defense as a permissible justification and all of the others referred to common defense or defense of the State, and in the Articles of Confederation and the Constitution itself there is no reference to self-defense?

Mr. Gura: Your Honor, the State courts interpreting those provisions that you reference had a different interpretation. For example, in 1895 Massachusetts--

Justice Stevens: 1895. I'm talking about contemporaneous with the adoption of the Second Amendment.

Mr. Gura: --Well, at the time we haven't seen State court decisions from exactly that era.

Justice Stevens: Just the text of the State constitutional provisions, two of them refer to self-defense. The rest refer only to common defense; is that not correct?

Mr. Gura: On their literal text, yes. But judges did not interpret them that way, for example in North Carolina--

Justice Stevens: I understand that judicial interpretation sometimes is controlling and sometimes is not. But the text itself does draw a distinction, just as the Second Amendment does. It doesn't mention self-defense.

Mr. Gura: --While it might not mention self-defense, it was clear that the demands that the States made at the ratifying conventions were for an individual right, and Madison was interested in--

Justice Stevens: Well, if you look at the individual rights I suppose you start back in 1689, the Declaration of Rights in England. And the seventh provision that they talked about said that: "The subjects which are protestants may have arms for their defense suitable to their conditions and as allowed by law. " Now do you think the term "suitable to their conditions" limited the number of people who had access to arms for self-defense?

Mr. Gura: --It was in England, but that was criticized by the framers. St. George Tucker's edition of Blackstone--

Justice Stevens: So you think that the Second Amendment is a departure from the provision in the Declaration of Rights in England?

Mr. Gura: --It's quite clearly an expansion upon it.



Justice Stevens: So that's not really your... you would not confine the right the way the English did then.

Mr. Gura: I think the common law of England is a guide, and it's always a useful guide because that's where the... where we... where we look to, to interpret--

Justice Scalia: It's useful for such purposes as what "keep and bear arms" means and things of that sort.

Mr. Gura: --It certainly is, Your Honor. And it's also useful to see how--

Justice Scalia: They certainly didn't want to preserve the kind of militia that America had, which was a militia separate from the state, separate from the government, which enabled the revolt against the British.

Mr. Gura: --That's correct, Your Honor.<sup>309</sup>

Justice Stevens' unusually intense inquiry questions Mr. Gura's argument for individual gun rights. This exchange is atypical for Justice Stevens and his vigorous counters appear to reflect biased sensemaking behavior. Justice Stevens argues from a historical position entrenched in collective gun rights rather than individual, and he supports that position with state constitutional provisions that suggest a collective right to gun ownership. The rapid fire nature of the justice's questioning prevents Mr. Gura from fully answering the justice's questions. Justice Stevens' argument prompts Justice Scalia to assist Mr. Gura in the articulation of a satisfactory response. Justice Scalia provides Mr. Gura with an argument countering the collective rights perspective by noting that the English Declaration of Rights is "useful for such purposes as what 'keep and bear arms' means and things of that sort. . . . They certainly didn't want to preserve the kind of militia that America had, which was a militia separate from the state, separate

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<sup>309</sup> U.S. 07-290 *District of Columbia v. Dick Anthony Heller*, 67-9.

from the government, which enabled the revolt against the British.” Justice Scalia’s assistance responds to Justice Stevens’ questioning with more directness and force than Mr. Gura could provide and plays a role in temporarily quelling Justice Stevens.

However, towards the end of Mr. Gura’s argument time, Justice Stevens again presses him, but this time on the issue of Mr. Gura’s reading of the Second Amendment. Justice Stevens’ argument causes Mr. Gura to accept his position without considering the consequences and both Justice Scalia and Chief Justice Roberts come to Mr. Gura’s rescue.

Justice Stevens: May I ask this question? Are you, in effect, reading the amendment to say that the right shall not be unreasonably infringed instead of shall not be infringed?

Mr. Gura: --There is that inherent aspect to every right in the Constitution.

Justice Stevens: So we can... consistent with your view, we can simply read this: ‘It shall not be unreasonably infringed?’

Mr. Gura: Well, yes, Your Honor, to some extent, except the word "unreasonable" is the one that troubles us because we don't know what this unreasonable standard looks like.

Justice Scalia: You wouldn't put it that way. You would just say it is not being infringed if reasonable limitations are placed upon it.

Mr. Gura: That's another way to look at it, Your Honor. Certainly--

Chief Justice Roberts: --you would define "reasonable" in light of the restrictions that existed at the time the amendment was adopted.

Mr. Gura: --Those restrictions--

Chief Justice Roberts: You know, you can't take it into the marketplace was one restriction. So that would be... we are talking about lineal descendents of the arms but presumably there are lineal descendents of the restrictions as well.<sup>310</sup>

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<sup>310</sup> U.S. 07-290 *District of Columbia v. Dick Anthony Heller*, 77-79.

Justice Stevens' question is directed to exploring the reasonable restrictions that may be placed on the Second Amendment. His interpretation of the amendment opens the door to potential restrictions unfavorable to the respondent and Justice Scalia and Chief Justice Roberts assist in narrowing the reasonable provisions that may be ascribed to the amendment. Justice Scalia suggests that the reasonable limitations can be left out of the language because they are implicit in the reading of the amendment. Chief Justice Roberts continues with Justice Scalia's reasoning by noting that reasonable restrictions would relate to those restrictions in place at the time of the amendment's creation. Both justices' provide a more succinct and historically contextualized response than what Mr. Gura could likely articulate and the two justices inform each other and support each other in confirming what limitations could be placed on individual rights, suggesting that they are likely committed to interpreting the amendment as support for individual rather than collective rights.

As Chief Justice Roberts and Justice Scalia assist respondent's counsel, Justice Souter lends substantial assistance to petitioner's counsel, and his assistance comes at strategic moments to assist Mr. Dellinger in responding to Justice Kennedy's questions. It seems likely that Justice Souter recognizes that Justice Kennedy may be persuaded to vote with the petitioner if he articulates a persuasive response to Justice Kennedy's questions.

Justice Kennedy: But the Second... the Second Amendment doesn't repeal that. You don't take the position that Congress no longer has the power to organize, arm, and discipline the militia, do you?

Mr. Dellinger: No.

Justice Kennedy: So it was supplementing it. And my question is, the question before us, is how and to what extent did it supplement it. And in my view it supplemented it by saying there's a general right to bear arms quite without reference to the militia either way.

Mr. Dellinger: [response excerpted]

Justice Souter: So what you are... what you are saying is that the individual has a right to challenge a Federal law which in effect would disarm the militia and make it impossible for the militia to perform those functions that militias function.

Isn't that the nub of what you're saying?

Mr. Dellinger: --Yes. That is correct.

In this exchange, Mr. Dellinger provides Justice Kennedy with an unfocused rambling explanation (left out for brevity purposes), and Justice Souter has offered a concise and succinct explanation of the essence of Mr. Dellinger's response. The assistance comes at a significant point in the argument in which Mr. Dellinger's response could satisfy Justice Kennedy's interpretation in which the Second Amendment addresses "a general right to bear arms quite without reference to the militia either way." Justice Souter's assistance implies a preference for petitioner's argument, and his strategic suggestion appears designed to sway another justice's vote, a vote that would likely give victory to Justice Souter's preferred position.

In another example of strategic assistance, Justice Souter again coaches Mr. Dellinger in his response to one of Justice Kennedy's questions.

Justice Kennedy: Well, there's no question that the English struggled with how to work this. You couldn't conceal a gun and you also couldn't carry it, but yet you had a right to have it. Let me ask you this: Do you think the Second Amendment is more restrictive or more expansive of the right than the English Bill of Rights in 1689?

Mr. Dellinger: --I think it doesn't address the same subject matter as the English Bill of Rights. I think it's related to the use of weapons as part of the civic duty of participating in the common defense, and it's... and it's... it's--

Justice Kennedy: I think that would be more restrictive.

Mr. Dellinger: --That... that could well... the answer then would be--

Justice Souter: Well isn't it... isn't it more restrictive in the sense that the English Bill of Rights was a guarantee against the crown, and it did not preclude Parliament from passing a statute that would regulate and perhaps limit--

Mr. Dellinger: --Well--

Justice Souter: --Here there is some guarantee against what Congress can do.

Mr. Dellinger: --Parliament could regulate. And Blackstone appears to approve of precisely the kinds of regulations here. Now—

In this example, Justice Souter actually uses Justice Kennedy's verbiage to address the question Justice Kennedy asked to Mr. Dellinger, "do you think the second amendment is more restrictive or more expansive of the right than the English Bill of Rights in 1689?" Mr. Dellinger fails to articulate a coherent argument, even stammering "that could well . . . the answer then would be--." His less than persuasive remarks are unlikely to satisfy Justice Kennedy and Justice Souter instead offers a more reasonable response echoing Justice Kennedy's concern with the restrictive nature of the Second Amendment in relation to the English Bill of Rights, stating "isn't it more restrictive in the sense that the English Bill of Rights was a guarantee against the crown, and it did not preclude Parliament from passing a statute that would regulate and perhaps limit--." Justice Souter's assistance attempts to balance Justice Kennedy's concern with the regulation of individual rights by formulating for Mr. Dellinger a proper explanation. These are the only examples of Justice Souter's assistance for Mr. Dellinger and it seems

very probable that his assistance came at a time when it could be most effective to altering the way another justice considers a case.

In summary of qualitative methods, Chief Justice Roberts, Justices Scalia, Breyer, Stevens, and Souter were all active participants who used oral argument as a time to assist, heavily challenge, and understand the intricacies of an advocate's argument. A view of Justice Breyer's discussion with respondent's counsel suggests that his imbalanced interaction was related to his desire to understand and form a compromise on the issue. Justices Scalia and Souter both assisted their preferred advocate during difficult moments of questioning. Two surprises occurred in qualitative analysis. Justice Stevens exhibited unusual behavior by heavily questioning respondent's counsel. Chief Justice Roberts extended oral argument time in order to allow the justices to explore necessary questions they held. His own questioning of the use and function of trigger locks emphasizes his own questions that may have gone unanswered had he not extended argument time. Except for Justice Breyer, the justices identified for biased sensemaking behavior in the quantitative section continued to reflect biased sensemaking behavior in their assistance and challenging of counsels, although they generally treated both parties with respect in the manner in which they questioned and addressed them. At no time did a justice question any advocate in a disrespectful or hostile tone.

### **Conclusion**

This chapter explored whether justices may behave differently in historically significant cases. Sensemaking behavior was apparent in the justices' rhetorical

discursive interactions, but the general interaction by the justices maintained a concern for ensuring their colleagues satisfy their questions. Justice Kennedy even notes the importance of extending time, when after the Chief Justice announces an extension, Justice Kennedy responds “because I did interrupt Justice Breyer.” Although I was not present for the case, an analysis of the oral arguments does seem to indicate the justices treated the case with greater care and attention than other cases, particularly because the Chief Justice extended oral argument time in the midst of the argument. Of course we cannot be clear why he extended the case’s argument, but it does seem reasonable that he recognized a number of justices, including himself, still held questions that were not addressed in the scheduled time. Even with the Chief Justice’s extension of oral argument, sensemaking may still have played a role in the justices’ consideration of the case. Imbalanced questioning, stringent challenging of opposing arguments, and assisting preferred advocates still suggests a flawed approach to problem solving and a resulting poorly considered decision. Oral arguments in *D.C. v. Heller* followed a more respectful pattern than arguments in *Morse v. Frederick* or *Kennedy v. Louisiana*. In this historically significant case, the justices did show greater care in their rhetorical discursive interactions, but I would still hope to see a more open process that more fairly considers the issues, rather than observing justices assisting certain counsels while challenging others. Chief Justice Roberts, Justices Scalia, Souter, Kennedy, Stevens, and Ginsburg all reflected preformed positions and did not appear open to changing their positions. It is unfortunate in a significant case such as this one that the justices choose to simply reinforce their positions rather than openly listening to contrarian perspectives.

Justices appeared to treat the advocates preferentially by those justices who supported their arguments and challenged equally by justices who disagreed with their position. Although both advocates received a similar amount of time, Mr. Gura spoke significantly less, largely due to Justice Breyer's heavy involvement. Mr. Dellinger faced stringent questioning from the Chief Justice and Justices Scalia and Kennedy, but these justices also enabled him to offer at length responses to their questions. Given the amount of time Mr. Dellinger was able to present, he held a real rhetorical advantage in the argument, although his inarticulate responses may have negated any time advantage afforded to him. Mr. Gura managed to offer succinct and concise responses to the justices which is always a strong technique within oral arguments. Neither Mr. Gura nor Mr. Dellinger endured any heavy ridicule. Chief Justice Roberts poked fun at Mr. Dellinger because of his explanation of the trigger lock, but it was good natured humor and posed no real threat to Mr. Dellinger. In general the advocates were treated with equal amounts of respect by the justices.

The Chief Justice's extension of time points to an underlying concern for the justices to reach a clear understanding of the case. Given this concern, reducing or correcting sensemaking behavior could also be a priority for the Chief Justice and this suggestion is included in a larger collection of recommendations in the following chapter. Thus far three cases have been analyzed and a reasonable case has been made for using the theory of sensemaking to evaluate and interpret Supreme Court oral arguments. The following chapter provides recommendations for scholars to consider other areas or lingering questions surrounding sensemaking in oral argument. The



chapter also provides lawyers and judges with practical suggestions for overcoming and addressing sensemaking behavior. The final chapter addresses criticisms that have arisen over the course of this research. Over the span of four years my findings have been presented at a variety of conferences and audiences have raised valid questions that I believe should be addressed. Finally, the chapter will raise questions about the conduct of certain justices in the courtroom, and consider which justice may do the least amount of harm in oral arguments.

## CHAPTER VII

### CONCLUSION

#### “SCALIA’S BIASED, WHO KNEW?”

“Their legitimacy is in the Constitution, but their power rests on public faith in their independence and impartiality.”

This study has responded to a series of progressive questions to understand the role of oral arguments from a communication perspective. Chapter II reviewed the perspectives of other fields and researchers in answering the question “Do oral arguments matter?” Research from political science, psychology and the legal community was considered to understand how these fields viewed the importance of oral arguments. Flaws were noted in how each of these fields approached their study of oral arguments, and communication was suggested as a field that could provide valuable insight into the study of oral arguments. Because no substantive research has been conducted on oral arguments in the field of communication, a theoretical answer to this question was derived from a traditional understanding of humans’ use of communication. From a communication vantage, oral arguments influence how justices consider and evaluate a case, simply put, because communication frames how humans understand and think about the world. Chapter III expanded on the importance of oral arguments, by exploring “how,” or in what manner, do oral arguments “matter?” Among the more obvious reasons related to the importance of oral argument, Sensemaking, a prominent communication theory, was suggested as a model of further understanding the justices’ interactions. Integrating Sensemaking as a model of decision

making suggests that communicative influence may arise from an actor's communication within an environment, such as, when dealing with the Court, the advocates' arguments, other justices' arguments, or a justice's own interaction in oral arguments. From the theoretical articulation of Sensemaking, a characterization of judicial sensemaking behavior was articulated to determine whether justices may align with behavioral expectations. Chapter IV proposed the method of examining cases and included an overview of the justices' rhetorical discursive style, and then applied the specified methods and analysis to *Morse v. Frederick* to determine whether the justices aligned with the proposed pattern of judicial sensemaking. Similar to chapters V, and VI, in which *Kennedy v. Louisiana*, and *D.C. v. Heller* were evaluated, various justices exhibited biased sensemaking behavior that may have compromised their own or their colleagues' consideration of cases. Some justices, such as Justices Scalia, Souter, Stevens, Kennedy, Breyer, and Chief Justice Roberts, often reflected rhetorical discursive interactions reflective of biased judicial sensemaking. Chapter VI questioned whether justices may approach oral arguments with a more balanced and careful inquiry during historically significant cases. In examining *D.C. v. Heller*, some justices continued to act as biased sensemakers through their rhetorical discursive interactions. However, there did seem to be a consideration among the justices, particularly by Chief Justice Roberts, that the justices should have their questioned answered by advocates, even if oral arguments exceeded the allotted time limit. This final chapter presents an overview of the study's findings to highlight the broad range of contributions, responds to potential criticism, provides recommendations to the Chief Justice, judges and

justices, lawyers, and scholars, and concludes by considering how the justices' rhetorical discursive interaction impedes justice.

### **Broad Ranging Contributions**

As chapter II noted, a dearth of research on Supreme Court oral arguments exists in the field of communication. This research provides the first in depth analysis of oral arguments from a communication perspective. Blending a unique collection of areas within the field of communication, (ethnography, rhetorical criticism, discourse analysis, and sensemaking) this study has offered a new form of analysis for understanding communicative interactions in oral arguments. Although the study offers a more concentrated form of analysis, by focusing on single cases, than other research in political science, psychology or law, rhetoricians, discourse analysts, and other communication scholars will likely recognize areas where even more analysis could be applied to oral arguments. My hope is that scholars will see the vast areas of improvement that can be applied to study of oral arguments. The following section discusses the study's contributions as well as potential areas for further research. A section further into this chapter will offer more suggestions based upon fields.

Beginning with chapter II's driving research question "Do oral arguments matter?," communication scholars would argue that all human communication "matters" because it shapes humans' understanding and in turn their construction of the world. Thus oral arguments, as communication, do "matter." After establishing the theoretical importance of oral arguments, Karl Weick's theory of Sensemaking was integrated to provide a model that emphasized the importance of communication within the decision

making process, and foregrounded the importance of oral argument as a part of the process in the justices' decision making.

Taking the stance that oral arguments do matter and offering a new model of decision making for considering oral arguments contributes uniquely to the traditional stance found within prior research on oral arguments. In addition, the integration of Sensemaking as a model of decision making should help scholars uncover even more about Supreme Court oral arguments, because it is the first proposed model that considers the role of communication in the decision making process. Ironically, past models largely viewed communication as reflective or indicative of an a priori mindset, rather than viewing language and communication as generative of humans' cognitive positions. The difference in these perspective results in viewing oral arguments as symptomatic of a cognitive adherence and viewing oral arguments as generating a cognitive adherence. Even if a justice enters the courtroom with a perspective in mind, or a heavily committed position, communication still serves to confirm a hunch or further bolster an intractable position. In addition, previous models did not provide any room for individualized behavior by the justices which caused scholars to group the justices as a whole based upon the resulting votes in a decision. Sensemaking recognizes that communication occurs at both the individual and group level, and that group level communication can influence individuals and vice versa. Sensemaking also makes room for individual decisions or behavior that departs from the group. Thus, Sensemaking allows the justices' rhetorical discursive interactions to be viewed in consequence to the individual as well as the group.

Scholars should consider other models of decision making to find other avenues of evaluating the Court's oral arguments. Communication scholars may find the Elaboration Likelihood Model a useful technique. Psychologists should consider evaluating individual communication in oral arguments instead of testing group behavior. A psychologist who has sat in the courtroom and viewed the various interactional behaviors of the justices could produce a valuable understanding of each justice's approach to problem solving. Political scientists could begin offering aggregate studies of individual justices, rather than attempting to define and generalize the Court's behavior; there are always anomalies to any generalized position and learning about the justices who do not neatly fit the typical mold would be both interesting and helpful.

Sensemaking is a potentially valuable model of decision making, but like other models and theories it represents a collection of behaviors and actions which are not consistent among theorists. I chose to rely on Karl Weick's understanding of sensemaking, but largely because using one theorist prevented a splintering of characteristics. My attempt to articulate a judicial theory of sensemaking was both an attempt to apply Weick's Sensemaking to the courtroom, as well as to limit the variety of behavior that could be considered in the study. One problem in applying Sensemaking to the study of oral arguments lies in the inadequate snapshot of one moment in the decision making process. Because Sensemaking views communication as an essential and formative component in the decision making process, scholars ought to follow and study, as closely as possible, a group's communication. However, because of the private closed door nature of the Supreme Court's decisional process, it is

impossible, even for clerks, to view the complete communication process the justices use to reach a decision. Justices make their final votes in a closed door conference that only the justices are allowed into, but even if an observer were allowed to study the justices' interactions, one could not follow the discursive process connected to the writing and negotiating of written decisions as justices conferred with each other and with clerks. This is one reason why the findings in this study and the use of sensemaking can only be theoretical. Another reason why findings regarding oral argument can only be theoretical is due to the impossibility of knowing a person's internal thoughts and reasoning. I do believe this study offers reasonable findings that may help further understand the justices' communicative interactions in oral argument.

Scholars may want to elaborate on other characteristics of sensemaking, such as the selection-enactment-retention model which describes the cyclical and self-reinforcing process communication may take to reconfirm a person's commitments. Linking a justice's communication in oral argument to prior language in written decisions or even *amicus curiae* could point to the self-reinforcing nature that oral arguments can play. Weick's understanding of mindfulness and its benefits to problem solving can also be elaborated upon. Finally, another characterization of sensemaking could offer new findings. I hope that my description of judicial sensemaking provides scholars with a tightly focused description of judicial sensemaking that they can reliably integrate into future studies; however, I also realize that first generation behavioral models are often subject to multiple revisions as they are refined or improved.

As partially discussed, chapter III built upon the foundation of chapter II, by expounding judicial sensemaking behavior and offering characterizations of potentially discernable behavior. Chapter III also articulated the use of communication theories (rhetoric and discourse studies) and communication methods (ethnography, rhetorical criticism, and discourse analysis) that could answer the study's driving research questions. In the way of contributions, scholars have never considered sensemaking from a judicial perspective and an articulation of judicial sensemaking extrapolated from Weick's theory of Sensemaking, provides researchers with a new collection and model of behavior they can further consider. Of course only scholars' use of judicial sensemaking can determine whether it is capable of withstanding critical consideration.

The triangulation of three methods is also a highly unusual move, but in this study I believe it yielded a comprehensive perspective that generated new insight into the study of oral arguments. The complex and dynamic interplay of communication within oral arguments required evaluation across multiple levels of purposeful communication. Oral arguments possess a quality where understanding and persuasion function simultaneously but can be interpreted differently for different actors, and an actor's speech can serve not only to influence other persons' minds, but can reinforce concepts for the speaker. Thus a speaker can persuade himself or herself through his or her own speech, but they are also capable of impacting other individuals in their interactions. The term "rhetorical discursive interaction" derived from the persuasive and comprehending interaction found within oral argument interactions. The term was



also designed to remind readers of the simultaneous action occurring within the Court's communications.

Chapter III concluded with a description of the analysis used in evaluating oral arguments. Prior scholars have not discussed their first hand observations of the Court's oral arguments, and their lack of experience calls into question their understanding. Each time I visited the Court I left with new insight that added further depth to my understanding. Out of all of the methods employed for studying oral arguments, first hand observations were by far the most valuable. Unfortunately, these vast observations do not fit neatly within a table or in the analysis of the justices' arguments in oral arguments, but rather they inform nearly every piece of analysis in this study.

I received a comment from a journal reviewer responding to my mention of the number of oral arguments I had observed. The reviewer suggested that mentioning the number of oral arguments was "self-serving." At first I was taken aback by the comment, but it was a self-serving comment, because I am offering to readers proof of my credibility, so they will understand that my observations and analysis do not derive strictly from others' observations found in texts. Part of my credibility as a researcher resides both in the depth of my understanding and experience with oral arguments, and in the rigorous and comprehensive application of my methods. Field study is still a respected form of information gathering, and Clifford Geertz wrote that the struggle in providing "thick description" lay in providing "thin analysis." Hopefully, my integration of ethnography with rhetoric and discourse analysis offered thick description coupled with equally thick analysis.

Derived from discourse studies' intimate involvement in examining dialogues and conversations, listening to oral arguments is also a new technique brought to the study of oral arguments. Because previous scholars have been focused upon longitudinal studies, they could not physically listen to every oral argument in a timely manner. However, listening to oral arguments was crucial to understanding the justices' rhetorical discursive interactions, because the meaning of an utterance changed with the tone of the justice, which could not be captured in the transcripts. Anger, hostility, or good humored statements became apparent where, on transcripts, the statements lacked sufficient meaning. Listening to oral arguments should be required for researchers to offer an accurate estimate of the justices' interactions, because so much depends upon researchers grasping the justices' or advocates' meaning through intonations.

Chapter's III's methods and theories represent a small spectrum of potentially useful methods within Communication. Other methods could clearly yield different results and I would be interested in what other methods scholars could apply to oral arguments. Oral arguments have never been more accessible to communication researchers. Oyez.org offers both transcripts and audio files, and the Court supplies electronic transcripts of their arguments soon after the case has been submitted. Communication and scholars from other fields can make valuable use of these materials for their analysis.

Chapter IV applied the theories and methods discussed in the prior chapters to oral arguments by laying forth a comprehensive list describing the purpose and importance of oral arguments to various sections of the country, including the Court

itself. Oddly, no real descriptive list has been offered by other scholars, perhaps they considered the task obvious or mundane, but the more than twenty purposes attributed to oral argument describes the richly meaningful and complex nature of the Court's interactions. The numerous purposes of oral argument also conveys that it cannot be reduced to language designed solely to change votes, as some scholars have suggested. The positions and issues found within oral arguments revolve around philosophical, personal, legal, and mundane issues relating to human nature. To suggest that they simply do not change voting patterns, is to claim knowing a justice's voting position, but also to claim that communication is irrelevant and without purpose. I would like scholars to consider other purposes of oral argument or further explore the frequency of occurrences of some of the purposeful behavior I described. For example, what are the intricacies and characteristics of oral argument as a ritual and how does this contribute to the Court?

Chapter IV also offered individual descriptions of the justices' rhetorical discursive behavior within oral arguments. This description, that may have been deemed superfluous to some, was also an attempt to provide scholars with a characterization of the justices' communication and behavior, and may be another example of the thick description I wanted to provide to readers. The chapter concluded in an analysis of *Morse v. Frederick* which compared the strategic actor model with the judicial sensemaking model to determine the prominence of sensemaking behavior in oral arguments. In the case's oral arguments, Chief Justice Roberts, and Justices Scalia, Breyer, Souter, Kennedy and Stevens behaved as biased sensemakers in their rhetorical

discursive interactions by demonstrating a significant preference for one counsel over another in their challenging of counsels, allowing counsels an equal opportunity to respond, frequency at which they interrupt counsels, assistance of counsel's arguments, and general treatment of counsels. Chapter IV's analysis of *Morse v. Frederick* offered real validity to considering the valuable potential of using Sensemaking to interpret and understand the significance of the justices' communicative interactions in oral argument. The chapter also revealed how justices may act differently from one another so that a single model of decision making fails to encapsulate every justice. Justices Ginsburg, Alito, and Thomas engaged in more balanced behavior that may have been more indicative of the strategic actor model, or mindful sensemaking rather than the biased sensemaking of their colleagues. Chapter IV also provided an extreme example of biased sensemaking behavior that was not found in the other cases. It is unclear the frequency at which justices become so aggressive with advocates and so biased with their arguments, but additional research could focus on the prominence of biased sensemaking behavior in cases with similar levels of contentiousness as *Morse v. Frederick*. The case was chosen to give readers a clear picture and understanding of the imbalanced behavior justices may employ.

Chapter V extended the successful use of theory and methods in Chapter IV and applied them to *Kennedy v. Louisiana*, an oral argument witnessed firsthand, to potentially identify further sensemaking behavior in the justices' rhetorical discursive interactions. Justices Scalia and Breyer, and Chief Justice Roberts reflected behavior closely aligned with biased judicial sensemaking. Witnessing this case's oral arguments

augmented the chapter's findings by capturing how active justices impede less active justices from engaging in oral arguments. Justices Scalia and Souter prevented Justice Stevens from asking a question, and the Chief Justice ended oral argument time as Justice Souter leaned forward to ask a question. The interesting and significant findings from this chapter emphasized how the justices' unintentional behavior could influence other justices' understanding of the case. Chapter V also foregrounded the importance of qualitative methods in the study of oral arguments, because quantitative methods did not accurately capture the justices' arguments. Overall, Chapter V bolstered the findings of biased judicial sensemaking within the study, and added further validity to observing the oral arguments first hand. Other communication scholars should consider attending oral argument to determine what other interactional elements they observe in the courtroom. Group communication experts could offer fascinating insight from the interactions they observe between justices and advocates.

Chapter VI questioned whether justices may approach historically significant cases with more careful and balanced consideration than minor cases. Oral arguments from *District of Columbia v. Heller* were considered because of the similarity in the justices, and the case offered the first review of the Second Amendment by the Court in over seventy years. In oral arguments for *District of Columbia v. Heller*, the majority of justices displayed vigorously biased rhetorical discursive interactions, and their behaviors suggest that justices may offer less consideration and diminished impartiality in their judgment of historically significant cases, a highly important finding. On the other hand, the Chief Justice extended argument time because of the vigorous oral

arguments, and it may have been due to the large number of questions justices wanted answered by advocates. The Chief Justice's extension of time may indicate a concern for the justices' to obtain comprehensive understanding in significant cases. However, the majority of justices still behaved as biased sensemakers, disappointingly implying that the justices may not be open to fairly considering historically significant cases. It would be interesting for scholars to extend their analysis to other major cases, such as *Bush v. Gore*, *Roe v. Wade*, or *Brown v. Board* to determine how the justices have acted in other major cases in the past and thus how their interactions may have dramatically shaped the landscape of the United States.

The following chapters have presented a variety of smaller arguments connected to the larger argument that the justices' rhetorical discursive interaction in oral arguments has the ability to influence a justice's decision making ability. Sensemaking was offered as a potential model of decision making that emphasizes the cognitive influence of communication in human decisions. By integrating a new approach to evaluating oral arguments, a specific analysis of three cases attempted to foreground sensemaking behavior in the justices' rhetorical discursive interactions. The previous research should have revealed the importance of the justices' interactions in oral argument. Thus far, there have been a significant number of contributions to scholarship on the Court's oral arguments, primarily because communication scholars have largely ignored the topic. This study's research has only scratched the surface of the significance of oral arguments. I hope that other communication scholars will begin to recognize the vast possibilities for research and academic contributions that can be found

in oral arguments. More will be said later about how various fields could further contribute to the study of Supreme Court oral argument. Of course while this study's contributions may be wide ranging, weaknesses exist, and it seems important to address criticisms that have been repeated from time to time during the course of this research.

### **Responding to Criticism**

This section will address potential criticisms surrounding the research conducted in this study. This study has been a work in process for nearly four years. In those years, research, analysis, and findings have been presented in classrooms, at conferences, and in journals. The fairly broad number of scholars who have read and reviewed my work will occasionally ask repeatedly similar questions. Readers and critics ought to question and challenge an author's message and well trained scholars have been ingrained with the requisite critical eye. So I have not taken affront to various criticisms levied against my research, but I do believe clarifying some of these questions and issues may resolve similar questions that readers hold.

*“What if the justices' behavior is not sensemaking, then is your work without value?”*

Some scholars have rightly challenged whether or not sensemaking behavior is occurring, or whether or not Sensemaking is a viable model for considering oral arguments. Just as what I advance in this study is a theoretical argument, if one were to dismiss the theory as unproven, then does the argument or research offer any additional insight? Sensemaking is not wholly necessary to offer scholarly contributions to the study of oral arguments. At the very least, this study has offered thorough research and

examples that demonstrated how certain justices' interactions within oral argument have hampered advocates' ability to advance their argument, or how justices have challenged the counsel they vote against or assisted the counsel with whom they will vote. The justices' rhetorical discursive interactions in oral arguments reveal their lack of commitment to the judiciary's impartial nature.

Ironically, at the highest level of the judiciary the justices do not reflect a balanced or equal consideration of cases, and this finding becomes even more distressing when considering that in historically significant cases, the justices continue their biased rhetorical discursive interactions, suggesting their decisions result from a flawed or partial decision making process. Although I did not include my analysis of *Bush v. Gore* because of differences in the sitting justices (the 2007 term contained two new justices), the justices' rhetorical discursive interaction reflected a heavy interactional bias from a majority of the justices, thereby influencing their consideration of the case. In one of the most significant cases in Supreme Court history, there ought to be, at the very least, a balanced consideration of the issues, rather than biased interaction. *D.C. v. Heller*, while not as historically significant as *Bush v. Gore*, contained biased rhetorical discursive interaction that may have impacted justices' evaluation of the case. Perhaps out of all the findings in this research, the most troubling may be that the justices do not act with anymore careful consideration in historically and socially significant cases, than in more minor cases. An understanding of the justices' behavior within oral arguments, does not fully rely on Sensemaking. Certainly the consequences of the justices' ability to cognitively evaluate the case in an impartial manner has greater significance when



viewed through the theoretical lens of Sensemaking, but without Sensemaking the justices' rhetorical discursive interactions still remain troubling.

*“Scalia’s Biased, who knew?”*

In connection with the consideration of historically important cases, another problematic finding is the pervasive occurrence of biased rhetorical discursive interaction by the majority of justices. As one reviewer noted, “Scalia’s biased, who knew?” The sarcastic comment, while reflective of a common belief in legal studies, struck me as ironic on a few levels. First, that we, as scholars, largely believe Justice Scalia acts in both a judicially and communicatively biased manner and yet we tolerate his biased behavior with little criticism. Second, the reviewer missed the larger point that while it may not be surprising that Justice Scalia behaves in a biased manner, it is surprising to discover that Justices Souter, Breyer, Kennedy, Stevens and Chief Justice Roberts displayed biased communicative interaction in the majority of the cases in this study. Scholars do not generally consider these justices to be biased in their judicial decisions or rhetorical discursive interactions. The fact that other justices appeared nearly as biased as Justice Scalia should be somewhat surprising to Supreme Court scholars, and may raise larger questions about the Court’s decision making process. Individual determinations also contribute information that aggregate studies fail to provide, so where larger studies place the Court within the strategic actor model or attitudinal model, this study’s approach is able to look within cases to understand how justice’s behavior may change on a case by case basis.

*“It’s just how the justices do things, it doesn’t mean there is a bias.”*

Some have argued that the justices cannot escape or choose not to change their biased communicative behavior, yet the justices are certainly capable of acting differently, and do in fact act differently in minor cases, or in cases where there tends to be a unanimous vote. In my observation of oral arguments, cases drew various levels of interaction that ranged from high levels, similar to those in the cases considered in this study, to lower levels in which advocates ended argument early because of a satisfactory presentation of their arguments, and minimal questioning from the justices. I chose to analyze divisive cases in this study, which tend to offer higher levels of interaction, because more is at stake in these cases. In divisive cases the rhetorical discursive interaction of justices becomes even more important because the case’s resolution may depend upon the vote of a couple or even a single justice. Thus justices’ decision making process is of great significance, and studying the communicative interaction of justices becomes all the more important to understand the quality of consideration they give to the issues. Given the importance of consideration within divisive cases, advocates should have the opportunity to present their arguments fully, for justices to have their questions resolved, and for justices to individually consider the issues before them, rather than having more active justices control the arguments presented, or potentially have active justices’ understanding of the case cognitively compromised by their own biased interaction in a case.

*“You are ignoring the nature of Argumentation.”*

Other critics have suggested I am not embracing the nature of “argumentation,” specifying that neither arguments nor speakers are equal in quality, ability or style, and this point is both valid and true to an extent. Superior advocates often deliver concise and poignant arguments, while novices may fail to provide clear responses to the justices’ questions, which in turn may bring a greater number of questions. But the cognitive effect of arguing must also be considered to understand how the justices’ rhetorical discursive interaction in oral arguments can influence their decision making process. And the justices should be striving for a balanced process, instead of the imbalanced interactions taking place in these case studies. The justices ought to offer advocates a relatively equal opportunity to address their case’s primary arguments, and respond to the justices’ questions. Justices should also allow their colleagues to resolve particular questions and issues they find pertinent to the case at hand.

Related to this issue, some have also noted that I tend to frame the Court through argument based upon competition rather understanding, or what is also known as dialectical argumentation. Approaching oral argument from the dialectical, rather than rhetorical or competitive perspective could alter our understanding of justices’ interactions in this study, so that justices who heavily challenge one party are actually attempting to understand that party’s position, rather than dismiss or overturn the arguments. Joining rhetoric, which emphasizes persuasion, and discourse, which emphasizes understanding, in a study that foregrounded the term rhetorical discursive interaction within oral argument, was an attempt to draw upon both the persuasive and

understanding nature that can be concomitantly involved in oral arguments. However, the end result of cases reviewed by the Supreme Court is typically an identification of a victor or winner in the case. How the Court chooses to resolve the case may limit a party's win, but competition surrounds the nature of legal disputes. Time limits are imposed to maintain a fair sense of competition between parties and an equal consideration by the justices. It is true that the justices are individuals who may or may not approach cases through simply competitive or understanding approaches to oral argument, and the justices may even shift their approaches depending upon their grasp of the case. Justice Breyer clearly approaches oral argument with a very different style and purpose than Justice Scalia, but the interaction of both justices still influences how the rest of the Court and how they themselves understand and evaluate a case. Whether the Court as a whole, or an individual justice engages in biased rhetorical discursive interaction for purposes of competition or understanding, the communicative interaction influences understanding for both the individual and the Court. So, the issue becomes less about the purpose of argumentation (persuasion vs understanding) and more about the quality of argument and consideration given to a case. Care should be taken to ensure that an equal level of understanding and persuasion is given to advocates in order for justices to achieve a balanced consideration of the case.

As with any study, criticism may attack a wide range of methods, analysis, and conclusions, but the larger issue this study has revealed, which I believe most critics would argue with, is that oral argument is not what it ought to be. This study offers compelling evidence that oral arguments can be potentially harmful to a justice's

decision making ability, and in turn the communicative interactions in oral arguments can be improved to enhance the justices' decision making ability and the advocates' opportunity to state their case. The justices' current behavior within oral argument does not offer an impartial consideration of issues, nor does it offer a fair, balanced, or equal evaluation of both parties in a case. Scholars who question whether oral arguments matter to the justices are in some ways asking the wrong question. The question we should be asking is "What should oral arguments be?" Because, as the large majority of scholars have implicitly noted with this question, oral argument in its current form is a highly biased process where justices do not appear to be fairly considering the issues before them. The following section provides recommendations for the improvement of oral arguments, suggestions for lawyers in addressing sensemaking justices, and recommendations for scholars in the study of oral arguments.

### **Recommendations**

#### *To the Chief Justice:*

Mr. Chief Justice, I began this study by noting the irony of a book length study largely dedicated to a single individual, yourself. As you are well aware, oral arguments are a step in the problem solving process for the Court. Generally, oral arguments do not determine the outcome of a case, but based upon the justices' comments in early sections of the study, oral arguments do frame a justice's consideration by either confirming or overturning a justice's tentative voting position. I realize that my integration of Sensemaking may not persuade you that your own and the other justices' interactions may cognitively influence how you evaluate a case, because few people are willing to

admit flaws in their approach to problem solving or admit flaws in an institution for which they hold a significant amount of pride. It is only human to reject criticism levied at you and at the Court.

However, I do believe that you feel oral arguments are important for the country, the advocates, and the justices, and I also believe that you feel the Court should provide the highest level of decision making the justices have to offer. Because of these reasons, I also believe that you have a vested interest in ensuring every step of the decision making process reflects careful consideration of a case's issues. You have made changes to the interactions involved in oral argument since taking over for Chief Justice Rehnquist, and I believe these changes are due to your experience as an advocate as well as your understanding that the justices' interactions were preventing the proper course of Justice. The findings in this study do not directly pose a threat to the Court, unless Congress were to adopt them, but they do suggest that improvements can still be made to the process of oral arguments, thereby ensuring that the most public process of the Court's oral arguments reflects a measured and careful consideration of the issues. My suggestions are minor and I believe you can integrate them with little difficulty if you so choose. All the changes simply require an awareness to the overall interactions of the justices and a concern for advocates' ability to clearly explain their arguments without the justices breaking their arguments into a fragmented collage.

- Extend Argument Time-As previously shown, Justices Breyer and Kennedy have both called for an extension of oral argument time, and you extended argument time for advocates in *D.C. v. Heller*. Your extension of time, and the justices'

call for an extension, relates to the understanding justices are able to obtain in a case. If you and your fellow justices are calling for an extension in time, then why not extend argument time during the argument? I realize for logistical purposes extending oral argument disrupts the Court's schedule, but during important cases it seems a minor change that could enable justices to have a better grasp of the issues and to have their questions resolved by advocates. The time limit for oral arguments should not be enforced simply for the sake of a rule, or for the greater importance of procedural efficiency, but the rule should rather be used as a guideline where flexibility may be applied when necessary. I also realize that advocates can tend toward rambling presentations and thirty minutes curtails disorganized arguments, and encourages concise succinct presentations, but the justices' heavy rhetorical discursive interactions can fracture and splinter even the best advocate's presentations. Consider the Solicitor General's argument in *D.C. v. Heller* in which he was unable to articulate the standard that should be applied to interpreting gun laws before his white light lit up. Only through Justice Souter's urging was he able to address the issue of the law's standard. Extending oral argument time *in medias res* would allow you to gauge the justices' interactions and determine whether extending time would be necessary; this change would also force advocates to be prepared for a thirty minute argument, and enable you to enforce this limit if a comprehensive case was being presented.

- **Be Wary of Interactional Imbalances**-As this study has noted, rhetorical discursive imbalances are a problem for the Court because they interfere with the justices' consideration of the case. This issue will be a more private matter you may take up with the justices, but you ought to consider urging the justices to take a more balanced and less partial approach to oral arguments. I understand in your early tenure that your suggestions will be unlikely to change the approach of more experienced justices, but as newer justices replace the retiring senior justices, your ability to shape their interactions will grow. This will be a slow change and may not be possible with more recalcitrant justices, but I would urge you to consider addressing the justices on this issue.
- **Invitation to Listen**-This may also be another private discussion, but can be reflected through your own level of interaction. Your level of interaction in oral argument is quite high, challenging even Justice Scalia, but it may be wise to suggest behavior more in line with Justice Thomas. For all the criticism directed towards him, Justice Thomas reflects active listening behavior and his behavior does not disrupt advocates' arguments. I am not suggesting that you or the other justices remain quiet, but rather that you consider the value of listening to the case instead of persistently arguing points with the advocate. Scholars may have suggested that oral arguments do not "matter" because of the lack of listening behavior involved in oral arguments, certainly some lawyers believe that the justices are present only to argue against their opposition.



- Control Overactive Justices-This issue may also be one that changes as the senior justices step down, but I have observed you control the justices' questioning in some instances and this control suggests that you have a concern for the quality of discussions taking place in oral arguments, as well as a need to allow advocates to address justices' questions before other justices' disrupt and fragment that advocate's response. Simply stepping in to allow advocates to respond or asking that justices wait until advocates have finished responding would enable a less fractured process and ensure a more comprehensive understanding of advocates' positions by the justices.
- Control the Vigorous Advancement of Positions-Coupled with the last suggestion, I do believe justices should be able to articulate and advance positions they find appealing, in order to inform their colleagues about what arguments are appealing to them, but a justice's vigorous or unnecessarily frequent argument with an advocate regarding a position wastes the Court's and the advocate's time. Advocates are charged with zealously defending their clients' case and will not be persuaded to reject their position by a justice's arguments. If a justice is attempting to expose the weakness of an advocate's argument, then let them address the point in conference. In oral argument, weaknesses in an advocate's argument will be side stepped and talked around, rather than directly admitted by the advocate. I have witnessed justices pursue advocates from every angle of an argument, pinning them in a clearly unfavorable position and the advocate will continue to reject the justice's

argument. Conference presents a much better opportunity for justices to discuss the strength and weaknesses in a case and it is closer to the resolution of the case where discussions can have a potentially greater impact.

- Revised Structure-The beauty of oral argument stands in its ability to adapt to each argument and to the justices' attention. Already Mr. Chief Justice you have offered a more welcoming environment in oral arguments by preventing the rapid fire interactions of the Rehnquist court. It is true that bad habits are difficult to break, and many of the current sitting justices developed bad habits of argumentation while under Chief Justice Rehnquist. However, you have an opportunity, as new justices replace the retiring senior justices, to change how justices and advocates approach oral argument. Including the prior suggestions will help to change the culture of oral arguments, but more can be done to offer an improved process of consideration. Allowing advocates the first five minutes to state their argument and more fully explain their position, presenting the justices with a more comprehensive understanding of the landscape from which the advocate is arguing. Five minutes without interruption is an eternity before the Court, but it is also short enough to force advocates to make a concise argument that articulates the essential points of their argument. These five minutes would allow advocates an opportunity to explain the necessary elements of their case without having the justices constantly pushing back and preventing a full articulation of their case. Normally the advocates have about a minute to a minute and a half to state their case before the justices begin their interruptions.

A few moments longer should enable a fuller picture of the arguments, and may minimize questioning as the advocate may address potential concerns or questions the justices hold. In addition to allowing an extended presentation period for advocates, you may consider your role to function more as a mediator or facilitator between advocates and justices, rather than only as a fellow participant. By a facilitator I do not mean to suggest that you need to limit your participation, but rather that you should pay special attention to the flow of communication between justices and advocates and remain mindful of the state of the argument as justices attempt to have their questions resolved.

Mr. Chief Justice these changes are fairly minor in relation to the significant benefits they could offer justices and advocates. If the goal of oral argument is to provide parties with an opportunity to make their case and explain issues to the justices, and the justices seek clarification and explanation of issues in oral argument, then the following suggestions can only improve the environment of oral arguments. Even if you disagree with my entire findings in this study, I hope you will recognize the benefits of some of these changes and consider working them into oral arguments.

*To Advocates:*

Although this study embraces a rhetorical and discursive perspective, I will not be offering rhetorical suggestions for advocates in this section. Already a handful of books provide rhetorical suggestions for advocates, but none consider how to address a biased sensemaking justice. In regards to the findings in this study, advocates should realize that the justices are flexible in their approach to oral arguments, offering biased

sensemaking behavior in one argument, and then behaving as measured inquisitors in the next. So the advice offered here must be integrated as advocates begin recognizing *in medias res* how justices are approaching a case. Returning to the metaphor of a family dinner, consider that you are visiting your partner's family for the first time during a family dinner. When first opening a discussion you may have some idea of what the various family members may say, but you may not be completely familiar with who is trying to support your position, who is trying to overturn it, and who is trying to understand what you are saying. It is important that you do not judge a justice too quickly for fear of overlooking assistance or making an early enemy.

Sensemaking can prove valuable to you in the quick recognition of a justice who is challenging you consistently but with whom you stand little chance in altering their position or convincing them of the validity of your argument. Sensemaking informs advocates that those justices with whom they experience significant resistance are not likely to change their minds, and thus time spent attempting to persuade those justices is probably a futile effort. Arguments from antagonistic justices should be bypassed by trying to curry favor with those justices who may support your position. For example, it is not uncommon for a justice to continually try to engage an advocate if they are heavily opposed to the position, but advocates should look to relate that justice's point back to an earlier friendly point made by another justice, and then physically turn towards the justice to whom you are referring. Physically altering your body and linking your communication to a more favorable position transitions away from the biased sensemaking justice and indicates to the other justices that they may engage in further

questioning. Connecting to a more favorable justice may also help you further entrench an already favorable position.

One of the most difficult scenarios advocates face is an unfavorable or even *ad absurdum* hypothetical posited by a biased sensemaking justice. Advocates may again try to bypass this situation by referencing a point made by a supporting justice, allowing the advocate to redirect focus away from the antagonizing justice, and gain standing with the supporting justice. If the advocate can bypass the argument or hypothetical and speak on a separate point for about ten seconds, then it is likely that another justice will jump in and redirect the questioning before the address can even properly address a point. If a justice insists on an advocate confronting an argument or hypothetical, then the advocate should do his or her best in addressing that issue. However, stalling or drawing out a lengthy response may cause an impatient justice to ask a separate question, redirecting the advocate away from the challenging hypothetical or argument, proving a valuable tactic.

In active oral arguments, managing justices and their questioning onslaught will prove more helpful than trying to persuade the justices of a particular position. On the other hand, if a justice appears to require specific information it is important to frame that information in a persuasive manner, demonstrating how that information supports the advocate's position. If the advocate has been unable to articulate certain crucial arguments, then it is helpful to tie that argument within a specific justice's response. Justices appear reticent to interrupt another justice's line of questioning, and connecting

an argument to a particular justice may both curry favor with that justice and buy the advocate precious seconds to articulate a point.

Justices' frenetic questioning may also be kept at bay if an advocate uses a mapping statement to state the number of points they want to make. Often justices will allow advocates to briefly state their points, and allow them to finish their progression as long as it is not too lengthy; in the *Morse* case, justices kept most responses by both counsels to within the ten second range. Lengthy uninterrupted statements are rare within oral argument, but if allowed time to articulate lengthy positions, then it could be a favorable sign for a counsel's position. Conversely, given the unusual instance of lengthy responses, it is important for advocates to reduce their arguments to terse statements they can present when appropriate. Justices often indulge an advocate who asks for a certain number of seconds to articulate their argument or response, and this too can be a valuable tactic to gain crucial time for a response.

Advocates should also consider the difference between the justices' and advocates' use language. When examining transcripts, justices often use language at the colloquial level, relying on legal language only when necessary. Advocates, on the other hand, cannot seem to depart from legal technical language, and may often get frustrated with a justice for not understanding the technical terms they are using. Confusion by both advocate and justice can result from technical language. Advocates should look to reduce their use of "legalese" and use technical language only when necessary or when referenced by justices. The manner in which justices understand and apply technical

terms is crucial for them to understand a case, and obfuscating language can force justices to rely on their sensemaking or prefigured understanding of a case.

Importantly, advocates traditionally have considered the most important justice to be the “swing” justice, that justice whose ideology falls within a moderate position in the case and is not decidedly against, or in support of a position. Theoretically, an advocate’s argument could then swing or influence a swing justice to vote in his or her favor. However, given the findings in this study, the justice controlling the rhetorical discursive interaction could be the most powerful and influential justice in the case, because he or she controls how information and arguments develop. In these cases, Chief Justice Roberts, and Justice Scalia consistently were the most active justices in the oral arguments considered; managing these justices’ interactions may be more important than persuading the swing justice, because these justices controlled the arguments that were presented and articulated for the swing justice. Redirecting an active justice’s comments may be the only technique to handle this difficult situation so that the advocate is able to bypass active justices and redirect their questions to influence the swing justice.

Finally, advocates need to be bold but respectful. The justices are often relying on advocates to help them resolve the issue at hand, and advocates should be prepared to explore and assist the Court. Advocates should not hide behind “that is not this case,” but look to address the hypothetical or argument the justice is exploring. Experienced advocates have developed a variety of personal techniques ranging from using one’s hands to negotiate the discussion and prevent other justices from interrupting them

during a line of questioning, to refusing to make eye contact with an antagonistic justice. Bold and forceful statements should not be avoided as long as advocates are maintaining a respectful tone; too often I have observed advocates turn justices into enemies by rudely addressing their questions.

*Judges and Justices:*

Although making suggestions for judges may be both fruitless and dangerously presumptuous, it can be no more presumptuous than addressing the Chief Justice, and it seems necessary that judges recognize that their own preconceptions and rhetorical discursive interactions can color their understanding of a case. This study's analysis makes apparent language's constitutive nature, and correspondingly, it benefits everyone to be aware of its far-reaching consequences in all social spheres, particularly those that have a direct impact on peoples' most basic right, the right to personal freedom and a fair trial. Language's constitutive nature has long been recognized by philosophers and scholars as a means of constructing the social world around us and how we understand the world.<sup>311</sup> Karl Weick notes that the importance of sensemaking lies in its constitutive nature which "address[es] how the text is constructed as well as how it is read."<sup>312</sup> In oral argument, justices create the text through their rhetorical discourse and

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<sup>311</sup> Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1971); William Labov, *Language in the Inner City: Studies in the Black English Vernacular* (U of Pennsylvania Press 1972); Dell Hymes, "In vain I tried to tell you": *Essays in Native American Ethnopoetics* (U of Pennsylvania P. 1981); Cathy Kohler Riessman, *Narrative Analysis* (Sage 1993); Dennis Mumby, *Modernism, Postmodernism, and Communication studies: A rereading of an ongoing debate* 7.1 *Communication Theory* 1, 28 (1997); Nelson Phillips and Cynthia Hardy, *Discourse analysis: Investigating processes of social construction* (Sage 2002); Daniele M. Klapproth, *Narrative as social practice: Anglo-Western and Australian Aboriginal oral traditions* (Mouton de Gruyter 2004).

<sup>312</sup> Karl Weick, *Sensemaking in Organizations* (Thousand Oaks, CA: Sage, 1995), 7.



their statements in turn influence how other justices experience and understanding the arguments. The more justices or judges challenge a counselor, particularly in a lopsided oral argument, such as *Morse v. Frederick*, the more they are reaffirming their own position, and the more they are impacting the opinions of other justices.

Language “produce[s] a social reality that we experience as . . . real.”<sup>313</sup> If certain justices or judges control the path of language through dominant questioning and aggressive interruptions, then those justices have played a significant role in limiting and framing how other justices understand a case. In these cases, Chief Justice Roberts, and Justices Scalia, Stevens, Souter, Kennedy, Ginsburg and Breyer controlled the majority of interactions in oral argument. These justices played a profound role in how each other and how the other justices understood the cases. By limiting advocates’ responses, challenging certain portions of a case, and providing assistance these justices dramatically shaped not only how the other justices understood the case, but also how the American people understand the case. Thus it is crucial for justices and judges to consider how their engagement in oral argument may shape the case at hand, and if a single justice cannot control their dominance then the Chief justice should step in to limit that justice’s presence in the case.

*Scholars:*

This study has attempted to call attention to the importance of oral arguments by noting that the justices’ rhetorical discursive interactions in oral arguments have the

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<sup>313</sup> Nelson Phillips and Cynthia Hardy, *Discourse analysis: Investigating processes of social construction* (Thousand Oaks, CA: Sage, 2002), 1, 2.

ability to influence a justice's, and the Court's decision making ability. Integrating Sensemaking as a potential model of decision making emphasized the role of communication in human decisions and identified biased sensemaking justices through their rhetorical discursive interaction. This study has offered a significant number of contributions to prior scholarship on the Court's oral arguments, primarily because communication scholars have largely ignored the topic, and previous scholars have ignored communication within oral arguments. However, scholars can expand significantly upon the findings within this study, and should consider other areas of study regarding the Court's oral arguments. At the beginning of this chapter, cursory recommendations were made to scholars as contributions were identified, but this section offers a broader range of suggestions that scholars should pursue.

Where other scholars have approached the study of oral arguments from an analysis of final voting positions to explain how justices came to reach that decision, in the end reflecting the scholar's adopted decision making model, this study has reverse engineered the traditional approach. I have been more interested in learning and analyzing the process justices take to solve a case's problems, and pay little attention to the voting position or the eventual written opinion in a case. I decided upon this approach because it foregrounds the public process of oral arguments that serves as the only available publicly observed step in the decision making process. The procedural nature of oral arguments is one reason why Sensemaking proved a helpful decision making model because Sensemaking emphasizes the process of decision making that can influence the quality of the solution rather than the final decision. Sensemaking's

concern for the communication process also enables it to serve as an ideal model to evaluate the justices' oral arguments. So where other scholars emphasize final decisions/voting positions to theorize a justice's process of reaching a decision, I emphasize analyzing the process to understand the quality of consideration justices gave to their final decisions. The unique approach taken in this study, like most forms of research, makes contributions to the area of Supreme Court oral arguments, but various fields can offer further valuable insight.

For communication scholars, this study took a broad range approach to considering various forms of communication in oral arguments. Argumentation is a significant area that was not considered to its fullest, but explaining a justice's individual style of argumentation would be a valuable contribution to our understanding of the Supreme Court. An argumentation study related to the different character of the various Court's across history would also contribute to an underdeveloped area. Ethnographers could study the performance of oral argument and the role playing that occurs in the Courtroom. Rhetorical studies should look at the role of persuasion and advocate's skillful or failing approaches to oral arguments. Oddly, style is a topic largely ignored before the Court, and moot courts often do not attempt to teach advocates stylistics techniques to assist them in maneuvering the justices' arguments and questions. Rhetoricians may also be valuable in analyzing the hypotheticals justices advance and could offer suggestions for how advocates ought to respond to them. I have long thought that a justice's hypothetical is often not well thought out or pertinent to the argument at hand, and rhetorical scholars could easily identify the useless or useful

nature of hypotheticals in oral arguments. Rhetoricians' concern for symbols also makes them a prime resource for considering the symbolic interaction within the Court's architecture and artwork. As a building the Court is richly symbolic and contains numerous layers of meaning. For example, at first glance the building appears as a replica of a Greek temple, but with a bit of research scholars will uncover that it is modeled after the La Madeline in Paris, a favorite building of architect Cass Gilbert, and the La Madeline was modeled after the Pantheon. Even the Court's veranda tiles match La Madeleine's tiles. For rhetoricians, a state building that is to be separate from church/religion but is modeled after a Catholic Church that is modeled after the Greek Pantheon (in Greek Pantheon means "Every god"), makes a densely complex symbolic object that invites analysis.

While rhetoricians may emphasize the symbolic nature of the Court, discourse analysts can better emphasize the interactional nature of the justices' arguments by studying the layers of meaning bound within advocates' and justices' iterations. The Court's interactions are richly complex and this study did not have the space to unpack the meaning surrounding actor's statements. Discourse analysts could also provide superior transcripts and a comparison with the Court's transcripts may yield an interesting understanding of what the Court's transcripts are failing to capture. Only recently did the transcripts begin identifying justices and laughter tags in the transcripts, and discourse analysts could make suggestions for other discursive qualities that the Court could easily integrate into their transcripts. A study of listening behavior and the importance of listening would also be a welcome contribution from discourse analysts,

particularly because oral arguments can be a difficult environment to listen and gather information.

Finally, and most complicated of all the issues, is considering sensemaking's role upon rhetorical and argumentation theory. Rhetorical and argumentation theory suggest that, when in an argument or debate, a person advancing a position will be met by an opponent resisting that position and potentially advancing a separate position. Under rhetoric and argumentation the goal is to persuade your opponent to take up your position by seeing the error of their own position; however, in debates or arguments, capitulation or admittance of an error rarely occurs. Instead, arguers typically become more firmly entrenched in their positions. In many ways, Sensemaking turns rhetorical theory and argumentation on its head, because it suggests that vigorous argument or persuasion may result in the speaker forming a cognitive bias to his or her own argument and position. Systematic and logical consideration become emotional attachments, and rhetoric and argumentation become less about persuading or changing an opponent's mind, and more about reinforcing ideas, either in yourself or your opponent. This perspective of rhetoric and argumentation counters the bulk of traditional scholarship dating back to Aristotle. Because this research is not designed to respond to this problem, it seems a pertinent and valuable area that rhetorical and argumentation scholars should address.

For scholars in political science and psychology, my suggestions may be a bit more rudimentary because I am not as familiar with your fields as I am with communication. However, I believe my findings may still offer questions that your

fields may address. For political scientists and psychologists, a consideration and engagement of the communicative interactions in oral arguments may offer further evidence of the decision making theories that you propose to interpret the Court's behavior. An analysis of a single case could also serve as a means of overturning competitive theories that do not explain the Court's behavior in that oral argument. As you know, outliers always make for interesting case studies, and no single case offers identical levels or types of communicative interaction which could offer new findings in your fields. Psychological explanation for the justices' utterances would also be an entertaining and fascinating study. Political scientists and psychologists have long offered decision making and personality determinations of presidents, but none have been offered on Supreme Court justices. In many ways the justices' perspectives are more public and accessible than presidents' remarks, and should offer a bulk of examples that could lead researchers to an accurate assessment; discussions with former clerks may also add additional insight. Finally, in regards to sensemaking behavior, longitudinal studies of the justices' sensemaking behavior could be very helpful in understanding the frequency at which justices act as sensemakers and identifying the individual justices who commonly reflect sensemaking behavior.

### **Conclusion: Pragmatic Idealism**

At midnight, standing in line for admittance to the Court's oral arguments is an experience. Depending upon the case, you may be one of the first in line, though some cases require observers to arrive days in advance. The Court always reserves seats for the public and this open policy attracts a wide swath of America. Among those in line

are law students, tourists, special interest groups, lawyers, the homeless, housewives, and high school students. As a group we stand waiting to be ushered through the bronze doors of the marble temple, and into the courtroom where images of angels and great lawgivers surround us. We gaze at depictions of the innocent and wicked judged by ethereal figures. The Court's symbol, a turtle, reminds us of the slow and deliberate pace of Justice. Within this sacred legal temple, it is difficult to imagine that this court receives petitions from prisoners scrawled on toilet paper, as well as *amicus curiae* from the President, or that the Court's words may grant both freedom and death to America's citizens. The Supreme Court stands as a place where, emblazoned above the entry, "Equal Justice Under Law," promises Justice to Americans, because "Justice," as the Court's West entrance declares, is the "Guardian of Liberty." And, while we should not forget, we often lose sight that it is for liberty that our judiciary exists. The Court remains an ideal, reminding both our citizenry and our legal community that Justice should always be the primary purpose.

The Court's "legitimacy is in the Constitution, but their power rests on the public faith in their independence and impartiality."<sup>314</sup> The Court's power results from the belief and faith of the American people and compliance to its orders relies on the Court's rhetorical authority. The Supreme Court occupies a strange place in American government because it lacks any self-executing power to enforce its orders. Whereas Congress and the President may command troops or control the flow of money as a means of enforcing policies, the Supreme Court lacks any similar ability. The Court's

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<sup>314</sup> Supreme Court video.

“rulings are not self executing. The Court depends on other political institutions and on public opinion to carry out its decisions.”<sup>315</sup> This dependence on other institutions relies on the belief and assent of Americans within those institutions. If Americans lack faith in the Court’s decision, then the Court’s orders may be ignored, and because the Court interprets principles from the sacred document of the Constitution, justices’ rulings may clash with popular culture. Yet the Court’s rhetorical authority must be applied judiciously by understanding the American people as its audience and the republic as its social context. The Court’s rhetorical authority can be ignored if its message lacks persuasiveness, as was the case in its prominent *Brown v. Board of Education of Topeka* decision, which required a second *Brown II*, and a third case to bring schools in line with the Court’s orders.<sup>316</sup>

The Court must carefully consider how to balance their rhetorical authority considering whether or not various political institutions will be persuaded by their rhetorical authority to support the Court’s orders because just as the Court relies on the people of the United States to carry out its rulings, “those [same] forces may also curb the Court.”<sup>317</sup> The beauty in the Court’s rhetorical authority lies in its rhetorical ability to strategically understand the American context and rely on persuasion to gain compliance.<sup>318</sup> The Court must act rhetorically to persuade the American populace to

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<sup>315</sup> O’Brien, *Storm Center*, xv.

<sup>316</sup> For more on the discussion of these issues see Friedman, Leon Ed. *Argument: the oral argument before the Supreme Court in Brown v. Board of Education*. New York: Chelsea House Publishers, 1969.

<sup>317</sup> O’Brien, *Storm Center*, xv

<sup>318</sup> For more on the relationship between the authority of law and individual choice see David Friedman’s *Republic of Choice* .



obey its orders. The Court's power, which flows from giving meaning to the Constitution, truly rests, in Chief Justice Edward White's words, 'solely upon the approval of a free people.'"<sup>319</sup> The relationship between the American people and the Supreme Court relies on the Court's ability to persuade the American people, and the freedom of the American people to obey or disregard the Court. It is the American people, as believers, who give the Court its power; their faith and assent in the Court validates its existence as an institution.

However, if the American people begin to question the Court's decisions or even the Court's process in making decisions, then the Court's credibility starts to slowly erode. Without credibility the Court cannot persuade or function effectively. The findings in this study suggest that the justices may not be approaching oral argument as effectively as possible and thus their decisions may be flawed as a result of their interactions in oral argument, impeding justice. If you believe, as this study has shown, that the justices' interaction can impact advocates' arguments, and in turn the justices' decision making ability, then we can agree that oral arguments are important to the decision making process, and should thus be conducted in a manner that enables balanced consideration of both parties. Moreover the justices' current behavior in oral arguments may call some to question the Court's credibility.

The justices on the bench right now have all been lawyers and spent a significant portion of their life arguing cases, but argument is a task separate from judgment. Argument entails attempting to persuade a person of a position, often times by refuting

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<sup>319</sup> O'Brien, *Storm Center*, xvi).

certain areas of their argument. Chief Justice Roberts, and Justices Scalia, Souter, Stevens, Kennedy and Breyer all spent a significant amount of time challenging and assisting advocates' arguments in this study. Their behavior was less in accordance with that of a judge, and more in accordance with that of an advocate or lawyer. But it appears entirely unfair and unjust for a judge to be an advocate, rather than an unbiased participant who weighs and considers arguments from both parties before making a decision. Their preferential treatment stands in opposition to the oath taken when entering office:

“I, XXX XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as XXX under the Constitution and laws of the United States. So help me God.<sup>320</sup>

To prevent biased rhetorical discourse, justices should be mindful of where they stand when entering cases, and, while participating in oral argument, justices should consider how their views may be influencing colleagues. Most importantly, the justices' biased rhetorical discursive behavior obstructs and impedes justice. The impediment to justice results from failing to understand the role of argumentation. As an art form and pragmatic approach to problem solving, argumentation requires participants to be listeners and respect one another, yet the justices do not typically behave as listeners or hold much respect for the advocates' or fellow justices' arguments.

Argumentation is an art form dedicated to resolving issues and achieving solutions to problems, but in order to reach a just solution, the process of argumentation

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<sup>320</sup> US Code Title 28, Chapter I, Part 453.

requires a level of respect and consideration for participants that the justices do not always embrace. “Argumentation is an instrument of communication to the extent that it functions as a social dialogue in which people articulate their differences, open themselves up to the ideas of others, critically investigate each argument offered, and work cooperatively to find answers or solutions.”<sup>321</sup> In oral arguments, the justices do not appear to “open themselves up to the ideas of others,” and rather appear as if they are more willing to dismantle others’ ideas. Oral argument serves more as a strategic battle or struggle than a careful examination, which in turn compromises the Court’s decisions.

Effective argumentation requires “that by listening to someone we display a willingness to eventually accept his point of view,” and “participants must not try to silence each other to prevent the exchange of arguments and criticism.”<sup>322</sup> Instead of viewing oral arguments as a verbal contest, justices should recognize that it can become “a collaboration or constructive working out of disagreements by verbal interactions in order resolve a conflict of opinions,” may ensure a deeper consideration of a case’s issues.<sup>323</sup> The goal or purpose of oral argument should not be that “one person’s views should dominate, but that all members of the community should be allowed to contribute and reason together collaboratively” towards a just resolution.<sup>324</sup> The justices’ current mode of rhetorical discursive interaction prevents a wholeness in understanding, and where “the great value of argumentation” lies in providing “a reliable means of arriving

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<sup>321</sup> Ridyacki and Ridyacki, *Argumentation*, 14.

<sup>322</sup> Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 17; Ridyacki and Ridyacki, *Argumentation*, 20.

<sup>323</sup> Walton, *Plausible Argument*, xi.

<sup>324</sup> Ridyacki and Ridyacki, *Argumentation*, 2.

at the probable truth,” or solution to the problem, the justices’ interactions reflect a larger struggle for control of the issues that should be considered, impeding and obstructing the course of justice.<sup>325</sup>

If one doubts the obstructionist nature of the justices’ interactions, then consider the comments described earlier by some of the justices who have stated that the justices’ back and forth questioning in oral argument impacts an advocate’s presentation of their case. Justices Stevens and Alito have lamented that some of their colleagues’ active involvement obstructs them from asking questions in a case and prevents lawyers from advancing arguments. “‘I really would like to hear what those reasons are without interruption from all of my colleagues,’ Justice John Paul Stevens said at an argument in the fall. One of the newest justices, Samuel Alito, has said he initially found it hard to get a question in sometimes amid all the former law professors on the court.”<sup>326</sup> Of all the justices, the justice who disrupts advocates and justices the least is Justice Thomas. The only justice not critiqued in this study has been Justice Thomas because his behavior never attempted to shape advocates’ arguments or his colleagues’ consideration of the cases; more than any of his colleagues, his behavior more closely reflected a just and balanced consideration of the issues.

In the three cases examined in this study, Justice Thomas did not utter a word. In fact over four years have passed and more than 300 cases have been argued before the

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<sup>325</sup> Ridyacki and Ridyacki, *Argumentation*, 21.

<sup>326</sup> Associated Press, “Thomas Silent as Supreme Court Talks On and On,” *www.Cnn.com*, 2/25/2008, 1,2.

Supreme Court since Justice Clarence Thomas last uttered a word in oral arguments. According to Thomas, he last spoke on February 22, 2006 during oral arguments for *Bowles v. South Carolina*.<sup>327</sup> Critics have harped that Thomas' silence suggests a lack of involvement in cases, but Thomas attributes his silence to the belief "that if someone is talking, somebody should be listening."<sup>328</sup> His approach clearly offers a different perspective from Justice Scalia. Since Justice Thomas' book release, he has been more critical about the other justices' frequent questioning in oral argument, proffering that his "colleagues should shut up."<sup>329</sup> At the very least, this research has offered findings that displayed the active presence of Justices, Scalia, Souter, Stevens, Kennedy, Breyer, Ginsburg, and Chief Justice Roberts in oral arguments. Justice Scalia has developed a notorious reputation for his sometimes bombastic and overly pugnacious presence in oral arguments. His behavior captured in this study reflects his biased aggressive approach that he brings to oral arguments. Clearly justices approach oral argument with different purposes in mind; whether that may be listening to a lawyer's arguments, asking a lawyer to clarify a question, or challenging a lawyer's argument, a justice's involvement may vary case by case. But a justice's behavior should reflect a measured consideration of the issues; their title reflects their responsibility.

Does Justice Thomas' silence in oral argument lend itself to a more informed perspective? Is his silence ideal for considering and reflecting on issues? If a justice

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<sup>327</sup> Dahlia Lithwick, "Open Books: Why Supreme Court Justices' Speeches Are Less Important Than Oral Arguments," *www.Slate.com*. 11/30/2007, 1,3.

<sup>328</sup> Associated Press, "Thomas Silent as Supreme Court Talks On and On," *www.Cnn.com*, 2/25/2008, 1,2.

<sup>329</sup> Lithwick, "Open Books: Why Supreme Court Justices' Speeches Are Less Important Than Oral Arguments," *www.Slate.com*. 11/30/2007, 1,3.

focuses on listening and reflecting upon arguments rather than attempting to refute a lawyer's argument, then it seems the quiet justice could have a real advantage in grasping the complexities of a case. The silent justice also allows colleagues to speak without interrupting and ask questions without diverting inquiry. To an advocate, the silent justice is neither necessarily beneficial, but nor does he serve as a detriment to arguments either. Justice Scalia suggests that "a good counsel welcomes questions," but undoubtedly many advocates would prefer if Justice Scalia kept his interaction to a minimum.<sup>330</sup>

However, regardless of their silent or active involvement, judicial behavior plays an important role in oral argument. The information and arguments that lawyers present to justices depend on the former's ability to answer a question or follow a line of reasoning without interruption. Similarly, justices' ability to ask a question relies on an environment in which they are permitted the opportunity to inquire about a topic. More active justices control the flow of information through the direction of questioning, while less active justices must either patiently wait for an opportunity to engage a lawyer, aggressively interrupt a previous line of questioning, or lose the opportunity to have their question answered. Although Justice Thomas did not participate in this study's oral arguments, his behavior was less biased and detrimental than that of his fellow justices. In all three cases, he provided lawyers with the opportunity to advance their arguments, and he provided his fellow justices with the opportunity to resolve potential questions.

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<sup>330</sup> Clarence Thomas, "Supreme Court Interviews" *Lawprose.org* (2006): accessed 10/1/2008.

His approach to oral arguments appears more reflective of judicial principles than Justices Scalia's, Breyer's, Souter's, Stevens', Ginsburg's, and Chief Justice Roberts' biased rhetorical discursive behavior.

Critics of Justice Thomas complain that his silence in oral arguments is indicative of his lack of attention or indifference to the case. As an observer at oral argument, I can understand why critics jump to this conclusion. He regularly leans back in his chair, covering his eyes for a few minutes, or he leans forward with his hand on his forehead shielding his eyes. He also frequently turns to Justice Breyer on his left or Justice Scalia to his right and speaks without directly listening to the arguments. But I also have observed him intensely rifling through counsels' briefs, pointing out sections to Justices Breyer and Scalia, and quietly arguing legal points.<sup>331</sup> What critics have perceived as indifference, are more likely moments of intense reflection and careful listening. In these moments of intense listening, Thomas assumes an indifferent posture, typically followed by a frenetic reaction to a lawyer's argument, causing Thomas to request materials, thumb through briefs, or argue quietly with Justices Breyer or Scalia. During my weeks of observation, Justice Thomas' behavior appeared more indicative of careful reflection than bored indifference.

In comparison to the rhetorical discursive interactions of his colleagues, Justice Thomas' behavior more closely reflects how justices should act. Justice Thomas has pointed out that he thinks his colleagues should "ask questions. But I don't think that

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<sup>331</sup> I have also spoken with clerks who sit behind the justices and they confirm that the justices' discussions nearly always refer to legal arguments at hand.

for judging, and for what we are doing, all those questions are necessary.”<sup>332</sup> His comment suggests that justices should limit their questions to those essential to the case, because “once the cases get to the Supreme Court, there are no surprises left” no new discoveries for the Court to make; as Justice Thomas puts it ““this is not Perry Mason.””<sup>333</sup> Justice Thomas recognizes that each justice has his or her own particular approach to oral argument, some justices “like to talk about it” other justices “enjoy the questioning and the back and forth,” and other justices “think that if they listen deeply and hear the people who are presenting their arguments, they might hear something that’s not already in several hundred pages of record.”<sup>334</sup>

Justice Thomas’ approach to oral arguments may not be ideal for all the justices, and it seems reasonable that each justice has their own particular approach to oral arguments. Even top advocates have mentioned their appreciation for questions by the justices, and while Justice Thomas may not represent the ideal audience for these advocates, his silence suggests a form of respect for the advocates, and their arguments, a respect that the other justices do not always provide to advocates. In noting Justice Thomas’ silence, I am not suggesting his lack of questioning is the preferred method of oral arguments, but rather that his interaction in oral argument does not hinder an advocate’s ability to advance an argument, or negatively influence how his colleagues understand a case. When comparing Justice Thomas’ silence to the aggressive

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<sup>332</sup> Paul Bedard, “This is Not Perry Mason,” *U.S. News & World Report*. Nov. 11, 2007, 1,2.

<sup>333</sup> Paul Bedard, “This is Not Perry Mason,” *U.S. News & World Report*. Nov. 11, 2007, 2.

<sup>334</sup> Paul Bedard, “This is Not Perry Mason,” *U.S. News & World Report*. Nov. 11, 2007, 2.



pugnacious style of Justice Scalia's biased questioning or softball arguments, it is easy to see which justice has the greater potential for committing injustice. For all of Justice Thomas' silence, he does not stand in the way, nor force upon others his view of justice.

“When the Supreme Court speaks, by and large people obey. And that unspoken contract is one of the hidden keys to our freedom. If the Court ever stopped defending the Constitution or the people ever stopped listening, then one of the treasures that keeps this nation the freest nation in the world, would cease to exist.”<sup>335</sup> The justices owe the Court as an institution, and the American people an improved approach to a currently misguided process of oral arguments. The American people trust that the Court presents “a willingness to protect the unpopular to stand against the temporary political tide, a concern for principles beyond today's politics. People want to know that there is some institution that's taking a long view.”<sup>336</sup> The Court cannot be caught in the biased partisanship that dominates politics, because that partisan mentality and behavior may destroy the Court's legitimacy. The Court's most public act and ritual, oral argument, should reflect the measured and balanced principles of justice. “Most people are willing to accept the fact that the Court tries to play it straight. That acceptance has been built up by the proceeding hundred justices of this Court going back to the beginning. We are in fact trading on the good faith and the conscientiousness of the justices who went before us. The power of the Court is the power of trust earned, the trust of the American

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<sup>335</sup> Narrator, Supreme Court Video.

<sup>336</sup> Narrator, Supreme Court Video.

people,” and the Supreme Court must remain ever vigilant in its pursuit of Justice to maintain our trust.<sup>337</sup>

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<sup>337</sup> Justice Souter in the Supreme Court Video.

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